Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1614

OTIS R. BOWEN as Governor of the State of Indiana;
THEODORE L. SENDAK, as Attorney General of the State of Indiana;
HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION, a public corporate body,

Petitioners,

vs.

UNITED STATES OF AMERICA,
and
DONNY BRUBELL BUCKLEY,
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEODORE L. SENDAK
Attorney General of Indiana
DONALD P. BOGARD
Chief Counsel
WILLIAM F. HARVEY
Special Counsel
ATTORNEYS FOR PETITIONERS
Office of Indiana Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6249

C. E. Pauley & Co., Inc., Indianapolis

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners[1], Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of the

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[1] The parties in the Seventh Circuit who are considered respondents herein are: United States of America; Donny Brurell Buckley, Alycia Marquese Buckley, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein; The Board of School Commissioners of the City of Indianapolis, Indiana; Karl R. Kalp, as

State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; and the Indiana State Board of Education, a public corporate body (hereafter State Defendants) respectfully pray this Court issue a Writ of Certiorari to review the Opinion of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) issued on February 14, 1978, in Cause Numbers 75-1730 through 75-1737, 75-1765, 75-1936, 75-1965, and 75-2007, on remand from this Court. 429 U.S. 1068 (1977).

OPINIONS BELOW

The opinion of the Seventh Circuit on remand was issued on February 14, 1978, and has not been officially reported. That Opinion has been appended hereto at page A-1. The Order of this Court remanding the case to the Seventh Circuit may be found at 429 U.S. 1068 (1977), and the Opinion of the Seventh Circuit which was vacated and remanded may be found at 541 F.2d 1211 (7th Cir., 1976). A-31. The decision by the United States District Court for the Southern District of Indiana, Indianapolis Division (hereafter District Court) which gave rise to the appeal to the Seventh Circuit may be found at 419 F.Supp. 180 (S.D. Ind., 1975). A-68.

Superintendent of Schools; Erle A. Kightlinger, as President of the Board of School Commissioners; Jessie Jacobs, Carl J. Meyer, Paul E. Lewis, Lester E. Neal, Constance R. Valdez, W. Fred Ratcliff, Members of the Board of School Commissioners of the City of Indianapolis; The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Perry Township, Marion County, Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Wayne Township, Marion County, Indiana; The Metropolitan School District of Decatur Township, Marion County, Indiana; The Franklin Township Community School Corporation, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; The School Town of Speedway, Marion County, Indiana; The School City of Beech Grove, Marion County, Indiana; Citizens for Quality Schools, Inc.; Coalition for Integrated Education; Indiana State Teachers Association.

Other decisions by the District Court and the Seventh Circuit in this case are 332 F.Supp. 655 (S.D. Ind., 1971), *aff'd.* 474 F.2d 81 (7th Cir., 1973), *cert. denied* 413 U.S. 920 (1973); 368 F.Supp. 1191 (S.D. Ind., 1973), *aff'd.* 503 F.2d 68 (7th Cir., 1974), *cert. denied* 421 U.S. 929 (1975). Those decisions are appended to the Petition for Writ of Certiorari in No. 76-515.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 19(1)(b) of the Rules of this Court, to review an opinion of the Seventh Circuit which has so departed from the scope of the order of remand by this Court as to call for an exercise of this Court's supervisory power because the Seventh Circuit has ignored the order of remand from this Court and has decided a federal question in a way in conflict with applicable decisions of this Court.

The opinion of the Seventh Circuit was issued on February 14, 1978. This Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c).

QUESTION PRESENTED FOR REVIEW

Whether the decision of the Seventh Circuit so ignored the Order of Remand to require this Court to exercise its power of supervision over that Court and to reverse its decision on an important federal question which has been decided contrary to the applicable decisions of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in part, as follows:

> § 1. Citizenship — Due Process of law — Equal protection.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

§ 5. Power to enjoin amendment.—The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 2000c-6 provides, in part, as follows:

(a) Whenever the Attorney General receives a complaint in writing—

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, . . .

and the Attorney General believes the complaint is meritorious and certifies . . . that the institution of any action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall impower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

STATEMENT OF THE CASE

The Petition arises from an opinion issued by the Seventh Circuit on February 14, 1978, remanding the Indianapolis school desegregation case to the District Court "for further findings of fact" following remand to the Seventh Circuit with instructions to that Court to reconsider the case in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) and *Washington v. Davis*, 426 U.S. 299 (1976).

I.

Course of Proceedings Below

A.

"Indianapolis 1"[2]

The original Indianapolis lawsuit was commenced on May 31, 1968, when the United States of America filed a Complaint in the District Court which was assigned cause number IP-68-C-225. The action by the United States was brought pursuant to 42 U.S.C. § 2000c-6(a) and (b), and was tried by the Court on July 12-21, 1971. Defendants in the aforementioned complaint were the Board of School Commissioners of the City of Indianapolis, its Superintendent of Schools, and members of its Board.

On August 18, 1971, the District Court issued its "Memorandum of Decision" holding that I.P.S. was guilty of *de*

[2] The District Court has characterized its various decisions in this matter as follows: Indianapolis I is 332 F. Supp. 655 (S.D. Ind., 1971); Indianapolis II is 368 F. Supp. 1191 (S.D. Ind., 1973); Indianapolis III is 368 F. Supp. 1223 (S.D. Ind., 1973); Indianapolis IV is 419 F. Supp. 180 (S.D. Ind., 1975).

jure segregation. The District Court's findings in that trial were that the I.P.S. School Board constructed three high school buildings in 1961, 1963, and 1967, the placement of which constituted acts of *de jure* segregation within I.P.S.

The Court permanently enjoined the defendants, their successors in office, officers, agents, employees and all those in active concert or participation with them from "discriminating on the basis of race in the operation of the Indianapolis School System," and further ordered the defendants to take seven steps to "fulfill their affirmative duty to achieve a nondiscriminatory school system." 332 F.Supp. at 680. In that regard the Court instructed the Plaintiff to bring in additional parties to seek "such relief as to the plaintiff seems justified," 332 F.Supp. at 680, including the possibility of the creation of a metropolitan school district for the area of I.P.S. and the surrounding school districts.

In that opinion the District Court speculated that a desegregation plan within I.P.S. only might not "work" because of the possibility of an "exodus" of white families from that school district.

The Petitioners herein were never parties to that proceeding in any manner. They did not present any evidence or examine any witnesses. They did not receive any notice of the proceedings and did not participate in the appeal thereof.

On September 7, 1971, pursuant to the order of the District Court, the United States filed a "Motion to Add Parties Defendant" and an order was entered on the same date which made twelve (12) school corporations defendants in the previously concluded case. However, the United States requested no relief against any of those twelve (12) school corporations, and no relief has since been demanded by the United States against those schools or any other added defendant.

On September 10, 1971, the original defendants filed their Notice of Appeal to the Seventh Circuit from the final judgment entered on August 18, 1971. The District Court's opinion was affirmed, 474 F.2d 81 (7th Cir., 1973). *Cert. denied* 407 U.S. 920 (1973).

B.

"Indianapolis II"

On September 14, 1971, a "Motion to Intervene as Party Plaintiff" was filed by Donny Brurell Buckley and Alycia Marquese Buckley who purported to intervene as representatives of a class comprised of Negro school age children in Marion County, Indiana. A "Complaint in Intervention" was filed with the motion, using the same cause number as the previously concluded case. That Complaint named the Board of School Commissioners of the City of Indianapolis, *et al.*, as defendants, and named the Superintendent of Public Instruction of the State of Indiana and nineteen school districts as added defendants. The "Complaint in Intervention" was brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343 (3) and the Fourteenth Amendment to the Constitution of the United States.

On October 21, 1971, an Amended Complaint was filed by intervening plaintiffs which named the Governor, the Attorney General, and the Indiana State Board of Education, a public corporate body, as added defendants. That complaint sought relief pursuant to 42 U.S.C. §§ 1983 and 1988, 28 U.S.C. §§ 1343 (3), 2201 and 2202, and the Fourteenth Amendment to the Constitution of the United States.

The Petitioners herein and the other added defendants filed motions with the District Court asking, in the new trial involving them, that they not be bound by the findings and evidence of the preceding trial and judgment.

In its Entry of December 30, 1971, the District Court denied those motions, but held that the Defendants could contest the issues raised in the first trial.

In its Entry of February 2, 1973, the District Court set a trial date and stated:

> ". . . The Trial will be limited to the issues formed on the amended complaint of the intervening plaintiffs . . . and the answers thereto."

In a "Pre-trial Conference" the day before the commencement of the trial in the new action, the District Court reversed itself and held that its findings in the first trial were *res judicata* in the second trial; hence the findings against I.P.S. stood as before.

Trial of the new action occurred before the District Court on June 12, 1973 through July 6, 1973, and those proceedings were reopened by the Court on its own motion on July 18, 1973. In that trial the parties were I.P.S.; ten (10) school systems located in Marion County, Indiana[3]; ten (10) school systems located outside of Marion County, Indiana[4]; and the State Defendants.

Two days after the District Court reopened the proceedings and took evidence, it issued its "Memorandum of Decision." In that Decision the Court refound the acts of *de jure* segregation on the part of I.P.S., and held that those acts were "imputed" to the Indiana State Board of Education and the State Superintendent of Public Instruction. The Court entered orders against all but one of the added Defendant school districts even though it *found* that there were no acts on *de jure* segregation attributable to any of the added defendant school districts.

[3] Those ten school systems include eight township schools and two schools serving a town and city located within Marion County, Indiana. Their combined enrollment in 1972-73 was approximately 77,611 children.

[4] Those ten schools were located in six Indiana counties surrounding Marion County, Indiana in which I.P.S. is located.

368 F.Supp. at 1208-1210. ***That finding has never been contested by any party in these entire proceedings.***

The District Court did enter findings against the Indiana State Board of Education and the Superintendent of Public Instruction. Those findings were that the findings against I.P.S. in the first trial, *i.e.*, that the placement of three high school buildings constituted acts of *de jure* segregation, were "imputed" to the State Defendants. ***No other specific findings were entered against any state officials.***

The District Court stated that it could desegregate I.P.S. within its own boundaries:

> "In other words, it is apparent that as a sheer exercise in mathematics, it would be possible for this Court to order desegregation of I.P.S. on a 58.9%-41.1% basis, or some similar thereto, so that no school could, for the time being, be racially identifiable as a black school . . ." 368 F.Supp. at 1198.

However, the Court then stated that the desegregation of I.P.S. could not be permanently accomplished within its own boundaries, primarily because of the possibility of resegregation "within a matter of two or three years." 368 F.Supp. at 1198.

Therefore, contrary to *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968), *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), the District Court was not looking for a plan that promised realistically to work *now*, but one that promised to work, it believed, for all time. Compare *Swann, supra*, at pages 31 and 32.

There was nothing in the Buckley complaint which in any way raised the question of the adequacy of an "Indianapolis only plan". The United States has never stated a claim for relief against the added defendants for any alleged segregatory acts. In fact, in oral argument, the

United States stated: "Upon the evidence that has been presented, we are unable to discern the existence of such violations". (T. 1973, p. 2818). Further, concerning the "state defendants", the position of the United States was, "we have seen no evidence of segregatory acts perpetrated by the state defendants." (T. 1973, p. 2819).

The issue of the feasibility of an Indianapolis only plan was put in the case by the District Court as it stated expressly during the presentation of the defendants' case in the 1973 trial:

> "[T]he purpose of this hearing is to concern itself with the method by which desegregation of the de jure segregated Indianapolis Public School City . . . shall be accomplished within the confines of the school city, or shall be a larger geographical area be considered [sic] . . ." (T. 1509-1510)

But the Court did not deny that a desegregation plan within I.P.S.—which had a ratio of sixty (60) per cent white and forty (40) per cent black—could be accomplished. Rather, the Court wanted to effect a desegregation plan for I.P.S. which, in terms of racial balance, would always be "stable". Compare *Pasadena City Board of Education v. Spangler, supra.* The gist of the Court's concept of desegregation was not a workable plan now, but a plan which once done would forever function in the particular way it was first decreed:

> "In my opinion of 1971, I suggested it might be more practical to put more emphasis on the word 'work' than on the word 'now'—which is why we are all here, I suppose. So . . . I am interested in finding out . . . whether or not it is practical, feasible, and workable to desegregate the Indianapolis School System within its own boundaries. I don't mean . . . 'Is It Mathematically Possible to Do It?'" *There is no use to take up all this time and all of this expense trying to determine if it is theoretically possible to desegregate a school system which has 60 per cent white and 40 per cent black.*
>
> *Obviously . . . it is mathematically possible. Any first grade student of mathematics knows that.*" (Emphasis supplied) (T.1973, pp. 1512-1513.)

In the entire record there is not a single piece of evidence which disputed the court's conclusion that a workable plan can now be effected in I.P.S. It was not disputed by any party in the trial, including the intervening plaintiffs and the United States.

Notices of appeal to the Seventh Circuit were filed by the original defendants and all added defendants by August 16, 1973, and on September 18, 1973, the United States filed its notice of appeal. The Seventh Circuit heard oral argument on February 20, 1974, and issued its decision on August 21, 1974, affirming the District Court in part, and holding that:

> ". . . the state officials have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries (see Part IV hereof.)"

The Seventh Circuit also held that the addition of the added defendants to the second lawsuit (after the Indianapolis I case was already on appeal), and binding those added defendants to the findings of Indianapolis I, was not a denial of due process.

Further, the Seventh Circuit reversed the District Court's rulings relating to a metropolitan remedy beyond Marion County, Indiana, and remanded the case to the District Court for further proceedings regarding a multi-district remedy within Marion County, Indiana. Certiorari was denied on April 21, 1975. 95 S.Ct. 1654 (1975).

In its opinion the Seventh Circuit pointed out that the District Court had found that the added defendant school corporations were not guilty of any segregatory or discriminatory acts. On the basis of *Milliken v. Bradley*, 418 U.S. 717 (1974), the Court held that the added defendant school corporations "beyond the Uni-Gov boundaries" were not subject to the inter-district remedies imposed upon them by the District Court. The Seventh Circuit interpreted *Milliken* as follows:

> "The Supreme Court further concluded that, even if state agencies participated in the maintenance of the Detroit system, as the lower courts had held, it did not follow that an inter-district remedy would be constitutionally justified or required." 503 F.2d at 79, 80.

After discussing various questions which had been raised on appeal, the opinion of the Seventh Circuit concluded:

> ". . . In accordance with Milliken v. Bradley . . . we reverse the district court's findings, conclusions, orders and rulings insofar as they pertain to a metropolitan remedy beyond the Uni-Gov boundaries; insofar as they pertain to a remedy within the boundaries of Uni-Gov, we vacate those rulings and remand for further proceedings consistent with that decision. The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with Milliken." Id. at 86.

Finally, the Court specifically instructed the District Court to disregard so-called "white flight" and to cease utilizing "white flight" considerations to delay complete desegregation within I.P.S. The District Court was directed promptly to formulate a decree which would eliminate desegregation existing within I.P.S. Id. at 80 and 86.

C.

"Indianapolis IV"

The Seventh Circuit remanded the case to the District Court specifically to determine whether a change in the civil boundaries of the City of Indianapolis without a corresponding change in the boundaries of the School City of Indianapolis warranted an interdistrict remedy.

However, in a Pre-Trial Entry dated December 13, 1974, following a Pre-Trial Conference on December 2, 1974, the District Court stated *inter alia*, that:

> ". . . the remaining issues appeared to be, at a minimum, the following: (a) The effect, if any, of the passage of the "Uni-Gov" Act in perpetuating de jure segregation within the boundaries of IPS, and (b), the effect, if any, of housing and zoning laws, rules, regulations, and customs in Marion County, Indiana, and its various political subdivisions upon the de jure segregation of IPS.

On March 18, 19, 20, and 24, 1975, the District Court held the trial which had been ordered by the Seventh Circuit and issued its "Memorandum of Decision" and "Judgment" on August 1, 1975. In that decision the District Court made a number of generalized and sweepingly conclusory statements without citation to any subsidiary facts or record evidence to support them.

Those statements related to public housing as developed by the Housing Authority of the City of Indianapolis and that because of the location of certain housing projects in IPS the State of Indiana "tended to cause and to perpetuate the segregation of black pupils in IPS territory." The District court concluded that because of the location of a few public housing projects within IPS, segregation within IPS was continued. But there was no finding that the housing projects found in the territory of I.P.S. caused interdistrict segregation, or caused racial segregation in

the additional Marion County School systems. There could not have been such a finding because there was no evidence to support it, and it would have been contrary to massive evidence introduced at trial.

The same kind of treatment was given to "Uni-Gov". The District Court found that Uni-Gov "inhibited desegregation with IPS". *There was never a finding that Uni-Gov caused inter-district segregation, or prevented black students from attending other Marion County Schools.*

As a remedy for these "violations" the District Court ordered a one-way transfer of black students from I.P.S. to the suburban school districts so that each suburban district would have a black student population of fifteen percent.

On appeal, a divided Seventh Circuit affirmed the District Court order, stating that:

> Because, in 1969, 95 percent of the blacks in Marion County lived in the inner city and segregation in its schools was under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were '[A] substantial cause of interdistrict segregation.' *Milliken v. Bradley*, 418 U.S. 717, 745 (1974), and '[C]ontributed to the separation of the races by . . . redrawing school district lines. . .' Id. at 755 (Stewart, J., concurring). 541 F.2d, at 1220.

The Seventh Circuit recognized that "Uni-Gov was a neutral piece of legislation on its face with its main purpose to efficiently restructure civil government within Marion County," but stated that the Indiana General Assembly *should have considered* "the *needs* of the school system [I.P.S.] in the Uni-Gov Legislation." 541 F.2d, at 1220. (Emphasis Supplied). Thus, a constitutional violation was not required by the Seventh Circuit.

After remand from this Court for further consideration in light of *Village of Arlington Heights, supra,* and *Washington v. Davis, supra,* the Seventh Circuit remanded the case to the District Court for further findings of fact in a thirty-one page document which contained the Seventh Circuit's opinion, a concurring opinion, and a dissenting opinion. In that dissent Judge Tone pointed out the futileness of remand to the District Court, stating at pages 30-31 of the slip opinion, Appendix A-29:

> If the issue of discriminatory purpose had not been previously addressed by the parties or the trial court, and had first entered the case because of the Supreme Court's remand, it would be appropriate for us to remand to the District Court for the taking of evidence and findings on that issue. But that issue was previously in the case. *Discriminatory purpose was specifically pleaded in paragraph 10 of the intervening plaintiff's amended complaint, and evidence was offered in an attempt to prove that allegation after our last remand.*[5] This was not an irrelevant allegation and it was not treated as such by counsel for the intervening plaintiffs, who understandably wanted two strings to their bow,[6] by counsel for the defendants, or by the district judge. *The proof failed, and the district judge carefully, as I read his opinion, refrained from finding the presence of discriminatory purpose. The tenor of his findings on both the Uni-Gov and public housing issues was such that it is inconceivable that he would not have found discriminatory purpose if he had believed it warranted by the evidence.* 419 F.Supp. at 182-183. In this tenth year of the litigation, I think that should be an end to the matter. The usual rule should be applied, and we should not send the case back to permit the intervening plaintiffs to make another attempt to prove allegations they have already tried but failed to prove, while a complete remedy for intra-district violations conclusively adjudicated in 1973 (474 F.2d 81) is delayed on the chance that an interdistrict remedy will ultimately emerge.[7] (Emphasis supplied.)
>
> . . .

[5] Which was for a determination of "whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*." 503 F.2d 68, 86.

[6] That the Court would hold as it did in *Washington v. Davis*, 426 U.S. 229 (1976), was, at the very least, foreseeable as a possibility. See 426 U.S. at 239-245; and see my earlier dissent, 541 F.2d at 1224.

[7] The brief for the United States filed in the Supreme Court in connection with the 1976 appeals and petitions for certiorari in that Court stated as follows:

> The United States commenced this suit to challenge racial discrimination by and within IPS. It prevailed on its claims. Full relief has been delayed for several years, however, while the district court has considered an expanded, inter-district remedy that the United States did not seek. In our view this delay has been fruitless, because the evidence has not demonstrated any purposeful inter-district racial discrimination of the sort that would justify an inter-district mandatory reassignment of students.

II.

Facts Material to Question Presented

The Intervening Plaintiffs filed their Amended Complaint in this Cause on October 21, 1971, alleging in Paragraph 10 thereof:

> 10. Section 314 of Chapter 173 of 1969, Burns Ind. Stat. Ann. § 48-9213 (1970 Cum. Supp.), which chapter is known as the "Consolidated First Class Cities and Counties Act" is unconstitutional and void insofar as its [sic.] purports to exempt from the scope and effect of said act the consolidation of all school corporations within Marion County, Indiana. *The purpose and effect of such exemption*, as further implemented and enabled by the provisions of Chapter 186 of the Acts of 1961, Burns Ind. Stat. Ann. § 28-2338 to 28-2347 (1968 Cum. Supp.) and Chapter 52 of the Acts of 1969, Burns Ind. Stat. Ann. § 28-2346a (1970 Cum. Supp). *have been and are to perpetuate segregation on the basis of race and to inhibit desegregation in the public schools and school systems of Marion County.* (Emphasis supplied).

The District Court has issued three reported decisions in this case which, pursuant to Rule 52 of the Federal Rules of Civil Procedure, constitute the findings of facts. Those finding and decisions encompass seventy-six pages of the Federal Supplement.

The "Consolidated First Class Cities and Counties Act" (hereafter Uni-Gov), I.C. 18-4-1-1 *et seq.*, which consolidated certain functions of the civil government of the City of Indianapolis and the County of Marion, was passed by the Indiana General Assembly in 1969 and took effect in 1970. Although Uni-Gov was effective two years before the District Court found segregation to exist in I.P.S., its effective date was also two years after the commencement of this lawsuit.

The only theory of the District Court in this case is, and always has been, that in some way, the General Assembly of Indiana should have anticipated that a United States District Court would, at a time in the future, find segregation to exist in I.P.S. Thus, the Legislature, accordingly, should have organized some form of school system in the entire metropolitan area of Indianapolis, but failing that, in the entire Marion County area, which would have placed a determined number of black students in certain undefined and unknown school in the municipal City of Indianapolis. Failing to do that, anticipatorily, would then mean an act of segregation on the part of the State, which would allow the District Court to enter its "remedy" orders, thereby complying in the District Court's judgment and that of one member of the Court of Appeals, with this Court's requirement in *Milliken, supra.* As the District Court stated, 419 F.Supp., at 183:

> . . . When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and this inhibited desegregation with [in] I.P.S.

But that is not causality, and it is not consistent with nor does it even recognize the law as established by this Court in *Milliken v. Bradley, supra, Pasadena City Board of Education v. Spangler, supra,* and *Dayton Board of Education v. Brinkman,* 433 U.S. 406 (1977).

REASONS FOR ALLOWANCE OF THE WRIT

I

This Court should exercise its power of supervision over the Seventh Circuit which has, in effect, ignored the order of remand from this Court.

A.

Introduction

On January 25, 1977, this Court granted the petition for writ of certiorari to the Seventh Circuit which was filed by these same Petitioners herein, vacated that Court's Judgment of July 16, 1976, and remanded the case for further consideration in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp., supra.,* and *Washington v. Davis, supra.*

Those two cases are not related to this case factually. Their relationship is found in this Court's holding that an intentional act to discriminate or segregate, with such act having a causal effect, is required on the part of a state defendant before a federal court's equity power may be invoked.

The Seventh Circuit ignored that remand order, and, in a three-opinion, thirty-one page document, remanded the case to the District Court for further findings of fact. Petitioners would submit, based upon the extensive record in this case, that the action of the Seventh Circuit is completely unjustified, and is simply delaying the desegregation of I.P.S.

B.

I.P.S. should be desegregated within its own boundaries

The final plan for desegregation of I.P.S. is long overdue. The United States brought suit against I.P.S. in 1968, and the District Court found I.P.S. guilty of *de jure* segregation in 1971. *U.S. v. Board of School Commissioners,* 332 F.Supp. 655 (S.D. Ind., 1971). That decision was affirmed by the Seventh Circuit, 474 F.2d 81 (7th Cir., 1973), and certiorari was denied, 407 U.S. 920 (1973). Thus, the students of I.P.S., who have been denied their constitutional rights, have been waiting since 1973 to have those rights fully redressed. Obviously, an entire high school class has come and gone.

The Petitioners would submit that the seemingly interminable litigation which has been predicated on the theories of the intervening plaintiffs and the District Court can no longer be continued because those theories have been repeatedly struck down by this Court. See *Milliken v. Bradley,* 418 U.S. 717 (1974) and *Austin Independent School District v. United States,* 97 S.Ct. 517 (1976).

The Solicitor General has acknowledged the futility of those theories, stating on page 11 of his brief to this Court in No. 76-515:

> The United States commenced this suit to challenge racial discrimination by and within I.P.S. It prevailed on its claims. Full relief has been delayed for several years, however, while the district court has considered an expanded, inter-district remedy that the United States did not seek. *In our view this delay has been fruitless, because the evidence has not demonstrated any purposeful inter-district racial discrimination of the sort that would justify an inter-district mandatory reassignment of students.* (Emphasis supplied).

In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), this Court clearly established the power

of a district court in a school desegregation case, stating at page 16:

> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that *judicial powers may be exercised only on the basis of a constitutional violation*. . . .
>
> . . . As with any equity case, the nature of the violation determines the scope of the remedy . . . (Emphasis supplied).

That principle was emphatically reaffirmed in *Milliken v. Bradley, supra,* wherein this Court stated, at page 744.

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation . . . *Before the boundaries of separate and autonomous school districts may be set aside* by consolidating the separate units for remedial purposes or *by imposing a crossdistrict remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation* . . . (Emphasis supplied).

In *Washington v. Davis, supra,* this Court stated, at page 2048:

> . . . The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. *The essential element of de jure segregation is 'a current condition of segregation resulting from intentional state action . . . the differentiating factor between de jure segregation and so-called de-facto segregation . . . is purpose or intent to segregate.' Keyes v. School District No. 1,* 413 U.S. 189, 205, 208 (Emphasis supplied).

Nevertheless, The Seventh Circuit on remand from this Court stated, at page 19 of the slip opinion, A-18:

> In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court held that state action is not racially discriminatory within the meaning of the Equal Protection Clause unless the action was taken for the purpose of discriminating between the races. *If Davis did not change the law, it at least changed the way lower courts had consistently interpreted it.* Because that case was decided after the instant case was last before the district court, neither the Government nor the intervening plaintiffs offered any evidence showing a racially discriminatory purpose. *Statements in earlier opinions in this case suggesting that there was no showing of discriminatory purpose should be disregarded in view of the fact that such showing was not deemed relevant at the time.* Accordingly, we must remand this case so that the district court may make findings on the question of intent consistent with *Davis* and *Arlington Heights.* (Emphasis supplied.)

In the first trial of this matter the District Court found that I.P.S. was guilty of *de jure* segregation. 332 F.Supp. at 658. The District Court reaffirmed that finding in the second trial, but expressly stated that none of the other separate and independent school districts involved therein was guilty of any *de jure* segregation. 368 F.Supp. 1191, at 1203. Thus, there was a violation in one school district, but no interdistrict violations.

That finding of no *de jure* segregation has never been challenged on appeal and is the controlling finding in this case.

Although there has been an attempt to justify an interdistrict remedy through "state action," the only findings

against the State Defendants were that "appropriate agencies" of the State Board of Education and the Superintendent of Public Instruction approved three school sites within I.P.S., which approval constituted acts of de jure segregation, and that:

> . . . officials of the State charged with oversight of the common schools have done almost literally nothing, and certainly next to nothing, to furnish leadership, guidance, and direction in this critical area. . . 368 F.Supp., at 1203.

Thus, the State Superintendent and Board of Education failed to "act affirmatively in support of the law [which] was an omission tending to inhibit desegregation." 368 F.Supp. at 1203.

In regard to school site approvals, this Court said in *Milliken v. Bradley, supra,* 418 U.S., at 751, that:

> . . . evidence was specifically limited to proof that school site acquisition and school construction within the city of Detroit produced *de jure* segregation *within* the city itself. *Id.*, at 235-238. Thus, there was no evidence suggesting that the State's activities with respect to either school construction or site acquisition within Detroit affected the racial compositions of the school population outside Detroit or, conversely, that the State's school construction and site acquisition activities within the outlying districts affected the racial composition of the schools within Detroit.

Likewise, there is no finding in this case that school site approvals within I.P.S. affected the racial composition of the added defendant schools. Thus, on remand to the District Court after *Milliken v. Bradley, supra.*, the only valid finding remaining against any State Defendant was that:

> . . . the state officials have, by various acts and omissions, promoted segregation and inhibited desegregation within I.P.S., so that the state, as the agency ultimately charged under Indiana law with the operation of public schools, has an affirmative duty to assist the I.P.S. Board in desegregating I.P.S. within its boundaries (see Part IV hereof). 503 F.2d, at 80.

Those "various acts and omissions" have never been listed in any manner, and no intent to promote segregation or to inhibit desegregation has ever been found.

In the nearly ten years of litigation in this case, with three extensive trials, thousands of pages of testimony, hundreds of exhibits, and scores of witnesses, there has never been one witness who has ever testified that he or she or his children were ever excluded from any school in any school system other than I.P.S. because of the race of that person.

The task here is not to produce a result in the name of a remedy merely because that result may appear desirable to some persons in the community, or to a federal district court. "That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause." *Washington v. Davis supra,* at 2048.

"[T]he remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken v. Bradley, supra,* 418 U.S. at 746. In that regard, Congress has provided in the Equal Educational Opportunities Act of 1974, 88 Stat. 516, 20 U.S.C. § 1712 that:

> In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court . . . shall seek or impose *only such remedies as are essential to correct particular denials of equal educational opportunities or equal protection of the laws.* (Emphasis supplied).

The District Court's remedial plan in this case cannot survive under the principles of the controlling cases and the Acts of Congress. It is unlikely to the point of impossibility that, but for any racial discrimination that might have had an interdistrict effect, every school district in Marion County would have had approximately 15 percent black students. There is nothing in the entire record of this case which indicates that the fixing of the school boundaries of I.P.S. or the failure to expand them, or the site selection of public housing, prevented the almost completely uniform distribution of students which the District Court's order required, and which the Seventh Circuit affirmed.

Likewise, the errors in the Seventh Circuit's 1976 opinion concerning low income housing by the Housing Authority for the City of Indianapolis (hereafter H.A.C.I.), 541 F.2d 1211, at 1222-23, are of the same nature as discussed above. The majority opinion accepted the District Court's determination that the effect of locating ten public housing projects in I.P.S. was to increase black school enrollment in I.P.S. because of a 98 percent black occupancy in that public housing.

But even assuming, *arguendo,* that that was the effect of the housing site selection, and assuming that the site selection increased the number of black students in I.P.S., it does not show racial discrimination in all *school systems* in Marion County. The majority in that Court and the District Court merely used this school case for a collateral attack on what was assumed to be racial discrimination in

public housing, an assumption that was made because a substantial number of persons living in those housing projects are black.

It was for that reason that this Court directed the Seventh Circuit's attention to the holding in *Arlington Heights v. Metropolitan Housing Development Corp., supra,* wherein this Court stated, 429 U.S., at page 264:

> Our decision last Term in *Washington v. Davis,* 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." Id. at 242. *Proof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause* . . . (Emphasis supplied).

See also *Hills v. Gautreaux,* 425 U.S. 284 (1976).

The Uni-Gov and public housing holdings in the Seventh Circuit's majority opinion, and in the District Court, *were not founded on a principle of constitutional law, but on the proposition that a State has an affirmative duty to eliminate racially disproportionate populations in schools, public housing, or other areas, regardless of whether the State or state action caused and intended that racial concentration.* But in *Spencer v. Kugler,* 326 F.Supp. 1235 (D.C. N.J., 1971), *aff'd.* 404 U.S. 1027 (1972), this Court summarily affirmed the district court's holding that even extreme racial imbalance, without more, does not authorize a court to revise neutrally established school district lines, and thus, the State would have no legal duty to do so.

C.

Conclusion

All issues of fact and law have been thoroughly tried and briefed through three trials and their subsequent appeals. School segregation has been found only in one school district, *i.e.*, I.P.S., and all other school districts have been expressly found not to be guilty of any school segregation. The Uni-Gov statute which was alleged in the Amended Complaint to have been responsible for segregation within I.P.S. has been found to be a racially neutral piece of legislation.

Therefore, there is no need for any further proceedings or any further attempt to find facts that do not exist. The issue in this case is, and always has been, the desegregation of the Indianapolis Public School system.

In *Swann, supra,* this Court stated at page 22:

> The constant theme and thrust of every holding from *Brown I* to date is that state-enforced separation of races in public schools is discrimination that violates the Equal Protection Clause. *The remedy commanded was to dismantle dual school systems.*
>
> *We are concerned in these cases with the elimination of the discrimination inherent in the dual school systems, not with myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the cases from Brown I to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes beyond their scope.* . . . (Emphasis supplied.)

Since the District Court and the Seventh Circuit have been unable to find any interdistrict segregation and no contributing state action to the segregation of I.P.S. in almost ten years of litigation, and since the Seventh Circuit has ignored the order of remand from this Court by ordering the case remanded to the District Court for further findings of fact, this Court should exercise its power of supervision over the Seventh Circuit, and issue the writ for which these Petitioners pray.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Chief Counsel

WILLIAM F. HARVEY
Special Counsel
Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6249

APPENDIX

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IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 75-1730 through 75-1737, 75-1765, 75-1936, 75-1965, and 75-2007

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

and

DONNY BRURELL BUCKLEY, et al.,

Intervening Plaintiffs-Appellees,

v.

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, et al.,

Defendants-Appellants.

On Remand from the Supreme Court
of the United States.

FEBRUARY 14, 1978

Before FAIRCHILD, *Chief Judge,* SWYGERT and TONE, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Our decision today is a continuation of protracted litigation which began in 1968 over whether and to what extent the public schools of Indianapolis must be desegregated. In our most recent opinion, we affirmed the district court's order calling for the busing

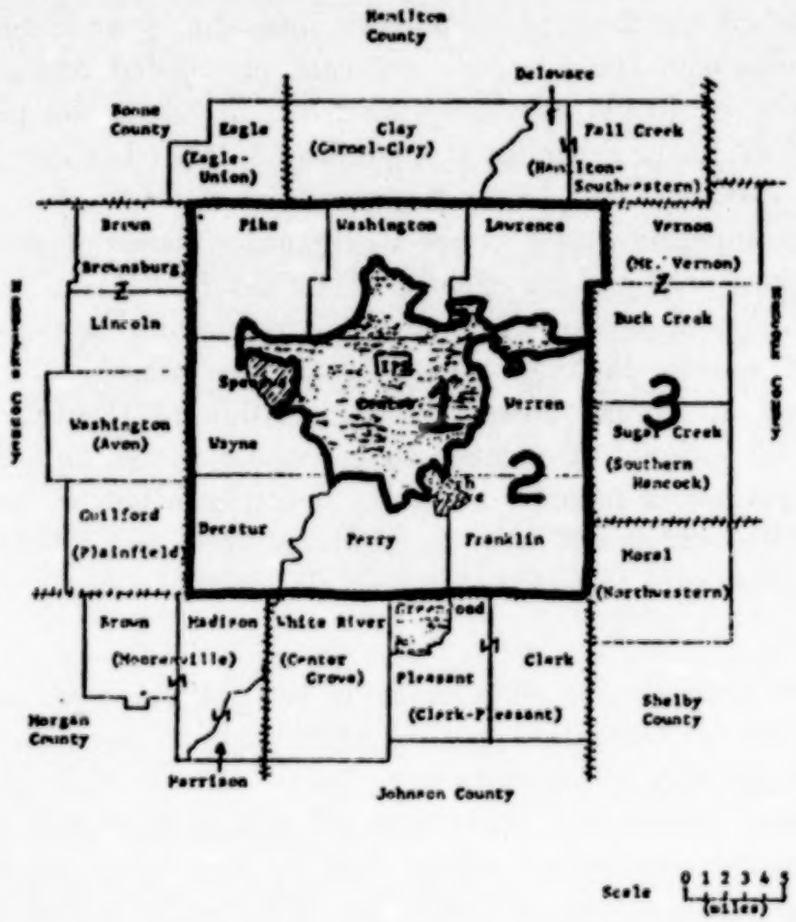
of black students from within the Indianapolis Public School District ("IPS") to schools which are outside IPS but within Marion County ("Uni-Gov"). *United States v. Board of School Commissioners*, 541 F.2d 1211 (7th Cir. 1976). The Supreme Court vacated our judgment and remanded the case to this court for further consideration in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976), which require proof of racially discriminatory intent or purpose to show a violation of the Equal Protection Clause. *See* 429 U.S. 1068 (1977). For the reasons and in the areas set forth below, we now remand this case to the district court for further findings of fact.

I

Because of the age of this suit, its sheer size, the number of parties which have intervened or have been added during the course of the proceedings, and the fact that this case has made several trips through the appellate process,[1] we think it would help to summarize the present posture of this case, namely, to identify those issues which have been settled and those which remain unresolved. Before proceeding to do so, however, it is important to understand the three geographical areas which have at some point been the subject of this litigation. As illustrated by the diagram below, those three areas include: (1) IPS, whose boundaries are coterminous with the City of Indianapolis (before Uni-Gov), (2) suburban school districts within Marion County and, since the enactment of the Uni-Gov Act in 1969, within the boundaries of the City of Indianap-

[1] The history of this litigation was described in our most recent opinion. *See* 541 F.2d 1211, 1212-15 (7th Cir. 1976), *vacated and remanded*, 429 U.S. 1068 (1977).

olis (after Uni-Gov),[2] and (3) school districts which are outside of and adjacent to Marion County.



[2] Under the Uni-Gov Act, Ind. Code §§ 18-4-1-1 *et seq.*, the boundaries of the City of Indianapolis were expanded to and became coextensive with the boundaries of Marion County. The new consolidated city is now called the City of Indianapolis. Ind. Code § 18-4-1-4. This new city includes all territory within Marion County except for the cities of Beech Grove, Lawrence, and Speedway ("excluded cities") which are permitted to carry on as separate municipal corporations. Ind. Code § 18-4-1-2. Cities in these excluded territories may still vote in mayoral and city-county council elections, however, and they receive certain benefits from the consolidated City of Indianapolis. *See Dortch v. Lugar*, 225 Ind. 545, 266 N.E.2d 25, 35-37 (1971).

On August 18, 1971, the district court found that the Indianapolis School Board was deliberately operating a *de jure* dual system on May 17, 1954 (date of *Brown I*), and had not changed its policies since that year in order to eliminate that *de jure* segregation. *United States v. Board of School Commissioners,* 332 F. Supp. 655 (S.D. Ind. 1971). In affirming, this court said, "[I]t is clear that the district court found a purposeful pattern of racial discrimination based on the aggregate of many decisions of the Board and its agents." 474 F.2d 81, 84 (7th Cir.), *cert. denied,* 413 U.S. 920 (1973). After reviewing the district court's findings regarding the gerrymandering of school attendance zones, the segregation of faculty, the use of optional attendance zones among the schools, and the pattern of school construction and placement, we held: "[T]he evidence of both segregatory intent and causation is substantial enough to support the district court's findings." *Id.* at 85.

On remand, the district court determined that state officials are ultimately charged under Indiana law with the responsibility of operating the public schools. The court further determined that these officials had caused and promoted segregation within IPS, so that the State had an affirmative duty to assist the IPS Board in desegregating its schools. 368 F. Supp. 1191 (S.D. Ind. 1973). We affirmed this holding on appeal. 503 F.2d 68, 80 (7th Cir. 1974), *cert. denied,* 421 U.S. 929 (1975). These rulings, finding both the Board and the State guilty of *de jure* segregation within IPS, now constitute the law of this case.[3] Accordingly, the parties and the courts are pre-

[3] The doctrine of the law of the case has been explained by the Supreme Court as follows:

> When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. Thus a cause proceeds to a final determination. While power rests in a federal court that passes an order or decision to change its position on subsequent review in the same cause, orderly judicial action, except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review. *Insurance Group Committee v. Denver & Rio Grande R.R.,* 329 U.S. 607, 612 (1947).

cluded from reexamining them. Desegregation remedies within the confines of IPS are therefore wholly appropriate.

The district court when fashioning a remedy was understandably concerned with the problem of "white flight." The court was opposed to a desegregation plan limited solely to IPS because evidence showed that such a plan would accelerate the white exodus with the resultant effect of resegregating the Indianapolis schools. The only feasible permanent desegregation plan, in the district court's view, was to order an interdistrict remedy which encompassed the entire metropolitan area, including the suburban districts within Marion County and the adjacent districts outside of the county (areas 2 and 3 in the diagram above). 368 F. Supp. 1191 (S.D. Ind. 1973).

This court, under *Milliken v. Bradley,* 418 U.S. 717 (1974), reversed the district court's order pertaining to the interdistrict remedy as to those school districts outside Marion County (area 3). 503 F.2d 68, 86 (7th Cir. 1974), *cert. denied,* 421 U.S. 929 (1975). This holding, as the one inculpating the State and the school board within IPS, is subject to the law of the case principle and therefore is closed to further examination.

The only issue before us, then, is whether the district court in the exercise of its equity jurisdiction may impose an interdistrict remedy which includes the transfer of students from IPS to the suburban districts within Marion County. Resolution of this issue necessarily presupposes an affirmative answer to each of the following subsumed questions: (1) whether at least one of the predicates for metropolitan relief as enunciated in *Milliken v. Bradley,* is present, and (2) whether the relevant acts or omissions

of state or local officials were motivated, at least in part, by a racially discriminatory purpose or intent as articulated in *Washington v. Davis* and *Arlington Heights.*

As will become more apparent below, resolution of these two preliminary questions requires remanding this case to the district court. On remand, the task of the district court is to make further findings of fact from evidence already in the record or, if necessary, as supplemented by additional evidence.

II

Any decision as to whether interdistrict school desegregation remedies may be imposed must begin with a consideration of the principles enunciated by the Supreme Court in *Milliken v. Bradley,* 418 U.S. 717 (1974). The Court in reversing the proposed interdistrict remedy in that case did not foreclose all metropolitan desegregation plans. As said in *Hills v. Gautreaux,* 425 U.S. 284, 298 (1976):

> Nothing in the *Milliken* decision suggest a per se rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred.

The underlying principle controlling the question of whether an interdistrict remedy is appropriate is that "the scope of the remedy is determined by the nature and extent of the constitutional violation." 418 U.S. at 744. Interdistrict relief was found impermissible in *Milliken* because there was no evidence that either the State or any of the suburban school districts had engaged in unconstitutional activity which had a cross-district effect. *Id.* at 748. The interdistrict decree was therefore impermissible because it was not commensurate with the

constitutional violation to be repaired. *See Gautreaux,* 425 U.S. at 294.

Before a court may impose an interdistrict remedy, a constitutional violation, *i.e.*, intentional state action, must exist which has significant segregative interdistrict effects.[4] *Milliken,* 418 U.S. at 744-45; *Gautreaux,* 425 U.S. at 294-96. The Court in *Milliken* gave several examples of violations having an interdistrict effect, including actual district line crossings by students, deliberate drawing of district lines on the basis of race, and state actions that affect residential patterns by influencing the location of families with school children. 418 U.S. at 745; 418 U.S. at 755 (Stewart, J. concurring).

The district court in the instant case found two violations upon which it based the proposed interdistrict remedies. *See* 419 F. Supp. 180 (S.D. Ind. 1975). The first was the failure of the State to extend the boundaries of IPS when the municipal government of Indianapolis and the other governmental units in Marion County were replaced by a consolidated county-wide government called "Uni-Gov." The second violation was the segregative housing practices by the State and its agents, such as the confinement of all public housing projects (in which 98% of the residents were black) to areas within the boundaries of the "old" City of Indianapolis. We must address each of these areas to determine whether they can form the basis for imposing interdistrict remedies under *Milliken.*

A

Whether the reestablishment of boundaries of the City of Indianapolis without the like reestablishment of IPS

[4] The place where the constitutional violation occurred is irrelevant for imposing interdistrict relief. It makes no difference whether the violation is inter- or intra-district. The crucial question is rather whether the violation caused or created a cross-district or interdistrict effect.

boundaries can form a basis for imposition of an interdistrict remedy within the "enlarged" City of Indianapolis requires a finding of intentional state action which causes a significant segregative interdistrict effect. To understand whether the Uni-Gov Act and its companion legislation meets the standards of *Milliken* requires a brief review of the history of school district boundaries in Indiana.

At Indiana common law, the boundaries of a school district and of a civil city were coterminous; when a city expanded its corporate limits, the school boundaries expanded correspondingly.[5] This rule was codified as to IPS by a 1931 Act which provided that the boundaries of IPS were to be coterminous with those of the City.[6] In 1959 the Indiana General Assembly enacted the School Reorganization Act[7] which had the effect or reducing the number of school districts outside Marion County from 990 to 305. 541 F.2d at 1217. The reorganized districts, however, were not tied to the boundaries of civil government and indeed some of the consolidated school districts even crossed county lines.[8] Once the school districts were

[5] *See* cases cited in 332 F. Supp. 655, 675 n. 86 (S.D. Ind. 1971).

[6] Acts 1931, ch. 94, § 1, provided in relevant part:

> [I]n each civil city of this state having . . . more than three hundred thousand inhabitants there shall be a common school corporation hereinafter called the "school city" whose duties shall be co-extensive with the corporate boundaries of such civil city.

Although this Act was amended in 1955 in order to increase the size of the IPS Board, the provision concerning the boundaries of IPS remained unchanged. Acts 1955, ch. 123, § 1.

On March 15, 1969, two days after the Uni-Gov Act was signed into law, section 1 of the 1931 Act was again amended, this time deleting all reference to the correspondence of boundaries of IPS and Indianapolis. Acts 1969, ch. 283, § 1; Ind. Code § 20-3-11-1.

Although the 1931 statute applied only to the City of Indianapolis, the boundaries of school districts and municipalities were also coterminous elsewhere in Indiana. *See* 541 F.2d at 1217.

[7] Acts 1959, ch. 202, § 1; Ind. Code §§ 20-4-1-1 *et seq.*

[8] Some seventy percent of the reorganized districts were not coterminous with other units of civil government. 541 F.2d at 1217.

consolidated, their boundaries were frozen and were no longer tied to civil annexation. For a variety of reasons, all attempts failed to consolidate IPS with any of the other ten suburban school districts within Marion County.[9]

In 1961 special legislation was enacted to give the Marion County schools the flexibility lost by the 1959 Reorganization Act.[10] Under this legislation extension of the boundaries of a civil city automatically extended the corresponding school district boundaries.[11] In summary, with the exception of the two year period 1959-61, the expressed policy of the State of Indiana until 1969 was that IPS would expand as the City of Indianapolis expanded.

Against this backdrop, two pieces of legislation were enacted by the Indiana General Assembly in 1969. Most notable was the Uni-Gov Act which transformed the "old" City of Indianapolis and the rest of Marion County into a

[9] *See* 541 F.2d at 1217-18. *See also* 368 F. Supp. at 1203-04.

[10] Acts 1961, ch. 186; as amended, Ind. Code § 20-3-14.

[11] Section 9 of the 1961 statute, which applied only to the City of Indianapolis, provided in pertinent part:

> (a) Whenever the boundaries of any civil city are extended by a civil annexation . . . the boundaries of the school city which has jurisdiction over the area of such civil city or the major portion thereof shall be correspondingly extended by virtue of such civil annexation.

The expansion of the school boundaries under this provision was automatic unless the school city and the losing school corporation mutually agreed against expansion of school corporations. Section 9(c). In addition, the school corporation whose territory was to be taken could oppose the civil annexation in a remonstrance suit. Section 9(b). Under this provision, however, a remonstrance to both school and civil annexation was necessary.

Chapter 186 of the Acts of 1961 also provided for two means wherein IPS could expand independently of the city. Section 3 permitted expansion if the IPS Board and the losing school corporation mutually agreed that IPS could expand. Section 4 gave IPS the unilateral power of annexation subject to the right of the losing school district to oppose by remonstrance on educational grounds only. Ind. Code §§ 20-3-14-3 to 20-3-14-6. No significant action was taken by IPS under these two provisions because they proved to be ineffective.

consolidated government.[12] Uni-Gov succeeded to most of the functions of the city and county governments and of numerous special service districts.[13]

Under prevailing Indiana law prior to 1969, the expansion of the City of Indianapolis to the Marion County lines carried out by the Uni-Gov Act would have automatically caused the concomitant expansion of IPS. But sixteen days before final passage of the Act, the General Assembly repealed section 9 of the 1961 Act.[14] This repeal for the first time separated the boundaries of IPS and the City of Indianapolis. This action had the effect of preventing the expansion of IPS boundaries. But for the repeal of the 1961 Act, IPS would now be coextensive with Marion County and this case would have a far different cast.[15] While we cannot say that this was done with a discriminatory purpose of intent because the district court has never

[12] This Act was officially entitled the "Consolidated First-Class Cities and Counties Act." Acts 1969, ch. 173, § 101; Ind. Code §§ 18-4-1-1 *et seq.* *See* n. 2, *supra.*

[13] Schools were specifically excluded from Uni-Gov as were some other governmental units, including *inter alia*, airport authority, health and hospital corporations, county department of welfare, housing authority, *etc.* Ind. Code § 18-4-3-14. Most of these units, including the schools, were previously independent having a corporate and legal identity separate from the City of Indianapolis. Many of these units had been reorganized before passage of the Uni-Gov Act wherein their jurisdiction was expanded to the Marion County lines. As noted earlier, *see* n. 9 *supra*, all attempts to consolidate and reorganize the Marion County schools failed.

The effect of Uni-Gov on the schools, as with the other excluded governmental units, was to keep their independent and autonomous status. As developed more fully in the text, the Uni-Gov Act, by itself, did not freeze the boundaries of IPS; the Act did not even mention boundaries. The sole effect of Uni-Gov on the schools was to maintain their prior independent status.

[14] Acts 1969, ch. 52, § 2.

[15] Four pieces of legislation were adopted by the 96th Session of the General Assembly in 1969 which affected IPS and its boundaries. These statutes were all enacted within eighteen days of each other. On February 25, the General Assembly repealed section 9 of the 1961 Act which had permitted the automatic expansion of IPS boundaries. Acts 1969, ch. 52, § 2; Ind. Code § 20-3-14-11. On the same day, the General Assembly added section 9(a) to the 1961 Act. This amendment effectively nullified the 1931 Act which had defined the boundaries of IPS as being coterminous with those of the City of Indianapolis. Acts 1969, ch. 52, § 3; Ind. Code § 20-3-14-9.

On March 13, 1969, the Uni-Gov Act was signed into law. Acts 1969, ch. 173. Section 314 of that chapter provided in pertinent part:

> All other municipal corporations . . . shall not be affected by this Act . . . . Without limiting the generality of following enumeration, such municipal corporations, ... shall include . . . any school corporation, all or part of the territory of which is in the Consolidated City or County. Ind. Code § 18-4-3-14.

Two days later, on March 15, the General Assembly amended the 1931 Act, eliminating the provision that IPS boundaries must be coextensive with those of the City of Indianapolis. Acts 1969, ch. 283, § 1; Ind. Code § 20-3-11-1.

addressed the question and for that reason the case must be remanded, *see* Part III *infra*, it is clear that this repeal and the other legislation enacted satisfied any formal test for state action.

The situation here thus differs from *Milliken* in at least one important aspect. In *Milliken* the school boundaries which limited the area into which a remedy could extend had apparently developed without consideration of race. At least no one appears to have contended that the boundaries were the product of racially invidious decisions of the State. In the instant case the legislature has, while this litigation was pending, chosen to enlarge the boundary of the City of Indianapolis for many municipal purposes while retaining the old IPS boundary for school purposes.[16] As was shown, this separation of the Indianapolis city boundary from the school district boundary was contrary to the State's traditional policy.

[16] This is not therefore a case, as in *Milliken*, where the state merely failed to redraw school district lines which may have been neutrally drawn initially. Rather, this case is more similar to those where the state actually redraws the district lines. *See, e.g., Wright v. Council of City of Emporia*, 407 U.S. 451 (1972); *United States v. Scotland Neck Board of Education*, 407 U.S. 484 (1972). Here the 1969 repeal of the 1961 Act prevented and froze what would have been a natural expansion of the IPS boundaries when the City of Indianapolis expanded to the county lines.

State action being present, our query next turns to whether that action caused significant segregative district-wide effects. In what way did the State's choice of retaining the old IPS boundary in lieu of expanding it with the City boundary have a segregative impact? It did so, we think, in curtailing the power of IPS to remedy its own violations. Had IPS expanded with the City, it could have accomplished desegregation by spreading its black school population throughout a larger area, much as the district court ordered. If IPS were recalcitrant about correcting its own violation, the district court could have more readily ordered such dispersal of the black school population without curtailment of district lines. This very lawsuit, challenging racial segregation in Indianapolis, was already pending when the legislative choice was made to confine IPS to its old boundary rather than make it coterminous with the City. In short, the combined 1969 legislation had the effect of ensuring that the effort to desegregate IPS (which had been initiated a year earlier by the Department of Justice) would not extend to the white suburban areas.

In light of the above, we hold that the passage of Uni-Gov and its companion legislation meets the requirements of *Milliken* and therefore can be used as a basis for imposing an interdistrict remedy if the district court finds that the General Assembly, in enacting the series of legislation, acted with a discriminatory intent or purpose.

B

It is generally agreed that racial residential patterns are reflected in the student composition of an area's public schools and that racial segregation in public schools and racial segregation in housing are integrally interrelated.[17]

[17] If a school system follows a neighborhood attendance policy, as does IPS, the racial composition of a residential area directly affects the racial composition of the schools.

Metropolitan Indianapolis is no exception to this phenomenon. In 1970, 98.5% of all black people in Marion County lived in the "old" City of Indianapolis, the area served by IPS. 332 F. Supp. at 663. Thus we find that blacks are concentrated in the "old" city while the suburbs are almost entirely populated by whites. This racial division in residential patterns is reflected in the public schools of metropolitan Indianapolis. During the 1968-69 academic year, 96.8% of all black students within Marion County attended schools served by IPS. Thus IPS was at the time this suit was

PERCENTAGE OF BLACK STUDENTS IN MARION COUNTY SCHOOL DISTRICTS

School District	1968-69	1976-77	net change
IPS	34%	45%	+ 11%
Beech Grove	0	—*	—*
Decatur	0	—	—
Franklin	—*	—	—
Lawrence	—	6	+ 6
Perry	—	—	—
Pike	4	17	+ 13
Speedway	0	1	+ 1
Warren	—	2	+ 2
Washington	6	17	+ 11
Wayne	1	2	+ 1

* Less than one percent.

filed and continued to be[18] racially segregated from the outlying school districts.[19]

[18] The overall black student population in Marion County has increased from 21% in 1968-69 to 26% in 1976-77, a net increase of five percent. As the following table shows, however, this increase has not been uniform among the school districts.

The evidence thus shows IPS is becoming increasingly black (45% in 1976-77 v. 34% in 1968-69), while the suburbs remain overwhelmingly white. In 1976-77 the percentage of black students in seven of the ten suburban Marion County school districts was still less than two percent.

[19] IPS is only one of eleven school districts in Marion County, the area covered by Uni-Gov. Although IPS serviced fifty-two percent of all Marion County public school students during the 1976-77 academic year, it serviced ninety percent of all the black students. The following

School District	Percent of Total Student Enrollment in County	Percent of Total Black Enrollment in County
IPS	52%	90%
Beech Grove	2	—*
Decatur	3	—
Franklin	2	—
Lawrence	6	1
Perry	8	—
Pike	3	2
Speedway	1	—
Warren	7	—
Washington	9	6
Wayne	8	1
	101%** (156,812)	100% (40,695)

* Less than one-half of one percent.
** The total of 101% is due to rounding off to the nearest whole number for purposes of readability.

Undoubtedly there are many contributing causes for racial segregation. But however complex the problem, it is clear that if residential segregation results from current or past segregative housing practices, there is a causal relation between those practices and the segregated schools.[20] Therefore, if the state has participated in or contributed to these segregative housing practices either directly (*e.g.*, selective location of public housing) or indirectly (*e.g.*, involvement in discriminatory practices in the private housing market), it can be said that the state caused, at least in part, the segregation in schools.

That segregative housing practices can be the basis of an interdistrict school desegregation remedy was suggested by Mr. Justice Stewart's concurrence in *Milliken*.[21] Justice Stewart noted that if school segregation flows from a "purposeful, racially discriminatory use of state housing laws, then a decree calling for the transfer of pupils across district lines might well be appropriate." 418 U.S. at 755.

table shows the present racial disparity between IPS and the outlying districts.

[20] The converse is also true: the racial composition of a school can also affect residential patterns. This is particularly so for couples with young families, one of the most residentially mobile groups in society. Although choice of location largely depends on available housing and economics, it also depends to a degree on the local schools. The influence of school patterns was noted by the Supreme Court in *Swann v. Board of Education*, 402 U.S. 1, 20-21 (1971):

> People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
>
> • • • • •
>
> It [location and closing of schools] may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

See also Keyes v. School District No. 1, 413 U.S. 189, 202-03 (1973).

Schools can also affect people other than families with school-aged children. Realtors, homeseekers, and prospective tenants often use the local schools (and their racial composition) as a key indicator as to the kind of neighborhood an area is or will become.

[21] The Court in *Milliken* explicitly stated that "in its present position, the case does not present any question concerning possible state housing violations," 418 U.S. at 728 n. 7, noting that the issue had not been considered by the court of appeals. Thus *Milliken* did not foreclose the use of housing violations as a basis for imposing interdistrict remedies as some would suggest. *See* 541 F.2d at 1228 n. 8 (Tone, J., dissenting).

In *Evans v. Buchanan*, 393 F. Supp. 428 (D. Del. 1975), the district court justified submission of a metropolitan remedy for school desegregation in part on governmental involvement in fostering segregated housing, which in turn caused segregation in the schools. The three-judge court in *Evans* found the development of "identifiable black schools mirrored population shifts," and that those population shifts resulted in part from "assistance, encouragement, and authorization by governmental policies." *Id.* at 434. The Supreme Court summarily affirmed this decision, 423 U.S. 963 (1975), and the Third Circuit subsequently affirmed the actual imposition of an interdistrict

remedy. 555 F.2d 373 (3d Cir. 1977), *modifying and aff'g*, 414 F. Supp. 328 (D. Del. 1976).

Considering the foregoing observations, we hold that an interdistrict desegregation remedy is appropriate if the following circumstances are shown to exist (given the fact that there is a vast racial disparity between IPS and the surrounding school districts within the "new" City of Indianapolis): (1) that discrminatory practices have caused segregative residential housing patterns and population shifts; (2) that state action, at whatever level, by either direct or indirect action, initiated, supported, or contributed to these practices and the resulting housing patterns and population shifts; and (3) that although the state action need not be the sole cause of these effects, it must have had a significant rather than a *de minimis* effect. Finally, an interdistrict remedy may be appropriate even though the state discriminatory housing practices have ceased if it is shown that prior discriminatory practices have a continuing segregative effect on housing patterns (and in turn on school attendance patterns) within the Indianapolis metropolitan area.

The record shows that the district court already has received evidence and has made certain findings in the area of housing discrimination. *See Indianapolis I*, 338 F. Supp. at 1204-05; *Indianapolis IV*, 419 F. Supp. at 183-85. It is important, however, that on remand the district court specify what state responsible housing practices of a discriminatory nature, if any, have resulted, at least in part, in segregative residential patterns. This is necessary not only to determine initially whether an interdistrict remedy is appropriate, but also to fashion an appropriate remedy.[22]

[22] In *Dayton Board of Education v. Brinkman*, 45 U.S.L.W. 4910 (June 27, 1977), the Supreme Court held that a district court, upon finding a constitutional violation, must first determine how much incremental effect the violations had on the racial imbalance in the schools. As a remedy can be designed to redress only the difference between the present racial distribution and what it would have been in the absence of constitutional violations, specific and detailed findings are required on remand.

C

Although we hold that either the enactment of Uni-Gov and its companion legislation or state discriminatory housing practices may provide a basis for implementing interdistrict relief, we must address one further point. The suburban school officials may not maintain that their districts must be excluded from any interdistrict remedy because they may be innocent of committing any constitutional violations, and that they should not be held responsible for the acts of the state legislators or other state subdivisions such as a local housing authority or a zoning board. The commands of the Fourteenth Amendment are directed at the state and cannot be avoided by a fragmentation of responsibility among various agents. *Cooper v. Aaron*, 358 U.S. 1, 15-17 (1958). If the state has contributed to the separation of the races, it has the obligation to remedy the constitutional violations. That remedy may include school districts which are its instrumentalities and which were the product of the violation. Thus, if state discriminatory housing practices have a substantial interdistrict effect, it is appropriate to require school authorities to remedy the effects even though they did not themselves cause this aspect of school segregation.[23] As Chief Justice Burger said in *Milliken:*

> Of course, no state law is above the Constitution. School district lines and the present laws with respect to local control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal

[23] That a remedy may include agencies of the state not themselves implicated in the constitutional violation was again recognized in *Milliken*. In that case the Court acknowledged that a desegregation remedy could have included the suburbs had the evidence shown that the violations by the Detroit school board produced significant interdistrict segregative effects. *Milliken v. Bradley*, 418 U.S. 717, 744-45, 748 (1974). *See also Hills v. Gautreaux*, 425 U.S. 284, 292-94, 296 n. 12 (1976).

courts have a duty to prescribe appropriate remedies. 418 U.S. at 744.

III

Even though segregative action for which the state or its agents may have been responsible comes within the governing principles of *Milliken*, the district court on remand must also determine whether that action (or inaction) was made with a racially discriminatory purpose.

In *Washington v. Davis*, 426 U.S. 229 (1976), the Supreme Court held that state action is not racially discriminatory within the meaning of the Equal Protection Clause unless the action was taken for the purpose of discriminating between the races. If *Davis* did not change the law,[24] it at least changed the way lower courts had consistently interpreted it.[25] Because that case was decided after the instant case was last before the district court, neither the Government nor the intervening plaintiffs offered any evidence showing a racially discriminatory purpose.[26] Statements in earlier opinions in this case suggesting that there was no showing of discriminatory purpose should be disregarded in view of the fact that such showing was not deemed relevant at the time. Accordingly, we must remand this case so that the district court may make findings on

[24] *See, e.g., Palmer v. Thompson*, 403 U.S. 217 (1971).

[25] *See, e.g.*, cases collected in *Washington v. Davis*, 426 U.S. at 244 n. 12. For example, in *Hawkins v. Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972) (*en banc*), one of the decisions explicitly disapproved in *Davis*, the court stated: "In order to prevail in a case of this type it is not necessary to prove intent, motive or purpose to discriminate on the part of city officials." *Id.* at 1172.

[26] As Judge Tone recognized in dissenting in our previous opinion:
The [plaintiffs] do not argue that the evidence shows a racially discriminatory purpose. In their briefs, filed before the decision in *Washington v. Davis*, the government assumes, and the intervening plaintiffs argue, that such a purpose need not be shown. *United States v. Board of School Commissioners*, 541 F.2d 1211, 1226 (7th Cir. 1976).

the question of intent consistent with *Davis* and *Arlington Heights*.

Because of the protraction of this litigation, we make the following observations with the hope that this matter can be expedited and that further appeals can be avoided.

The key to an understanding of *Washington v. Davis* can be found in the following passages. Courts must adhere "to the basic equal protection principle that the invidious quality of a law must ultimately be traced to a racially discriminatory purpose. . . . This is not to say that the necessary discriminatory racial purpose must be expressed or appear on the face of the statute, or that a law's disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. . . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." 426 U.S. at 240-42.

The Court amplified its intent requirement in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). It noted that "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes." Nor must it be shown that the intent to discriminate was the dominant or primary purpose. Rather the segregative intent need be only a "motivating factor in the decision" to establish a constitutional violation.[27] *Id.* at 265-66.

[27] Thus a complainant does not have to establish that "but for" the segregative intent the decision would not have been made. Such rigorous proof is not required not only because of the extreme evidentiary difficulties in proving that fact, *see Washington v. Davis*, 426 U.S. at 253 (Stevens, J., *concurring*); *Palmer v. Thompson*, 403 U.S. 217, 224-25 (1971), but also because an illicit motive may be only subordinate and still affect the outcome of a decision. *See* Best, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 119.

The Court in *Arlington Heights* further stated: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may available." *Id.* at 266. The first and often the most probative indicia of discriminatory purpose is the disproportionate impact or effect a law or other official act may have.[28] In some circumstances impact alone may be sufficient.[29] For example, where the discriminatory impact is great that impact may "demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." 426 U.S. at 242. As Mr. Justice Stevens observed in his concurrence in *Davis,* "when the disproportion is . . . dramatic . . . it really does not matter whether the standard is phrased in terms of purpose or effect." *Id.* at 254.

Where the effect or impact is not so great so as to itself infer segregative intent, a number of factors were noted to be relevant by the Court in *Arlington Heights.* They include:

(1) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes;
(2) the specific sequence of events leading up to the challenged decision;
(3) departures from the normal procedural sequence;
(4) substantive departures, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached; and

[28] The impact of the official action is usually the first factor to be examined because, regardless of the presence of a segregative intent, a law without a discriminatory impact does not give rise to a cause of action.

[29] This is not to say that it is the impact or effect which triggers the constitutional violation. Rather, when the discriminatory purpose becomes so stark, it becomes obvious that there could be no other basis for the action other than a discriminatory one.

(5) the legislative or administrative history of a decision. 429 U.S. at 267-68.

Discriminatory purpose is inferred from considering the totality of the available circumstantial evidence. *Davis,* 426 U.S. at 229. Even if no individual act carries unmistakable signs of racial purpose, a clear pattern is sufficient to give rise to a permissible inference of segregative intent. *Armstrong v. Brennan,* 539 F.2d 625, 637 (7th Cir. 1976).

Arlington Heights, while amplifying the intent requirement set forth in *Davis,* did not answer the crucial question of what type of intent a plaintiff must show in order to make out a prima facię case under the Equal Protection Clause. In short, *Arlington Heights* instructed the lower courts where to look for the required intent without defining its imminent nature. It is clear, however, that the *Davis* requirement of discriminatory purpose is not *scienter* (as known in the criminal law) and is not the subjective motives of individuals state officials, be they legislators or members of a local school or zoning board.[30] Such a test would pose an impenetrable evidentiary barrier for plaintiffs, for in an age when it is unfashionable for state officials to openly express racial hostility, direct evidence of overt bigotry will be impossible to find. Because a subjective test fails to measure the presence of discriminatory purpose when officials act discreetly, it is an outdated tool in the enforcement of the Equal Protection Clause.[31]

[30] Thus the terms "purpose" and "intent" must be distinguished from the word "motive" which usually refers to the subjective intent of individuals.

[31] A subjective test for intent has other crippling disadvantages as well. Under such a standard, it is unclear whose intent it is appropriate for the courts to examine. For example, it was the General Assembly which enacted the Uni-Gov Act and its companion legislation. Arguably, we therefore ought to scrutinize the legislative history of that legislation as well as any other records of what the members of the General Assembly were thinking during that period for evidence of subjective discrimina-

There is, however, a more fundamental barrier to the use of a subjective standard of intent which would direct courts to evaluate the motives of the individuals who comprise an institution or state agency. It has been established since *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1810), that a court may not invalidate legislation based on the improper motives of the legislators who enacted it. In *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971), the Supreme Court held that legislation that could be justified by racially neutral reasons could not be attacked on the ground that legislators were motivated by racial bigotry. Moreover, the Court in *Davis* held that this aspect of *Palmer* remained law, by interpreting *Palmer* as holding "that the legitimate purposes of the ordinance . . . were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations." 426 U.S. at 243. If discriminatory purpose is required for a constitutional violation, the inevitable conclusion is that the "segregative purpose or intent" relevant for equal protection analysis differs from the motivation of individual decisionmakers.

It is clear, therefore, that discriminatory purpose for constitutional analysis is to be gleaned not from individual officials but from the relevant governmental institutions.

tory intent. But which legislators' minds should we consider? Only those who voted in favor of the legislation? But what of those legislators who voted for legislation but did not harbor any racial motive? Should their votes be discarded? Likewise, should the votes of those who were racially motivated be considered in judging the legislation? As Mr. Justice Stevens observed in *Washington v. Davis*, "A law conscripting clerics should not be invalidated because an atheist voted for it." 426 U.S. at 253.

There is a more basic problem in limiting a search to the subjective motives of the individual legislators. To so limit our inquiry is to ignore the fact that the legislature frequently is nothing but a conduit for the desires of the individuals or interest groups which have influence and sources of power. To be comprehensive in our search we would have to examine their motives. At that point, however, we would be in a quandary, for there is no way to determine with any certainty the degree to which bigotry on the part of these persons or interest groups actually affected the General Assembly's decision.

As a subjective test would be impossible to apply in such circumstances, the courts are driven to adopt an objective criterion in determining whether the challenged state action is imbued with a segregative intent or purpose. Such criterion must include an examination of the institutional policy that underlies the action.[32] (By "policy" we mean a deliberate course of action, selected among alternatives, that is deemed advantageous or expedient.) We agree with the Sixth Circuit when it said:

> A presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively established that their action or inaction was a consistent and resolute application of racially neutral policies. *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1046-47 (6th Cir. 1977), *quoting Oliver v. Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974).

Thus if plaintiffs establish either that the governmental action or inaction under scrutiny does not further the governmental policies or that the government ignored less segregative options which would have furthered its policies as effectively as the more segregative option it chose, *see Armstrong v. Brennan*, 539 F.2d 625, 636 (7th Cir. 1976), then a prima facie case of discriminatory intent or purpose has been made out. This inference is justifiable because governmental institutions must be presumed to have knowledge of the natural and foreseeable consequences of their action of inaction, and because there are rarely significant nonracial reasons for preferring a more rather than less segregative alternative.

[32] *See generally*, Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto De Jure Distinction*, 86 Yale L. J. 317, 333-43 (1976).

IV

The district court's injunctive order against the Housing Authority of the City of Indianapolis ("HACI") must also be reexamined in light of *Washington v. Davis* and *Arlington Heights* for reasons which we shall develop. But first we state the facts as shown by the record before us.

Upon remand from this court in 1974, the district court entertained a cross-complaint brought by the IPS Board against the Metropolitan Development Commission of Marion County ("Commission") and the HACI, which were brought into the case as additional defendants. The cross-complaint alleged that the Commission and HACI materially contributed to segregation in IPS by consistently building public housing projects within the borders of IPS rather than in suburban areas, despite HACI's authority to build housing within five miles of the city limits and the Commission's county-wide jurisdiction. The court found that the Board's allegation was correct, and concluded that the inevitable effect of this policy was to increase the racial disparity between IPS and the suburban school districts because 98% of public housing tenants were black.

The court placed a major part of the responsibility for the lack of public housing in the suburbs on the resistance of suburban officials to the movement of blacks into their areas. It found:

> Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court. 419 F. Supp. at 183.

To remedy the segregative effect of the placement of public housing projects, the court enjoined HACI from building future projects within IPS.[33] It also prohibited HACI from reopening Lockefield Gardens, a vacant project, to anyone but elderly tenants. *Id.* at 186.

The district court's injunction rested on the conclusion that HACI and the Commission had violated the Equal Protection Clause. The court's holding was based on two findings: first, HACI and the Commission always located public housing within IPS even though they had authority to build in the suburbs; and second, suburban officials consistently resisted the construction of public housing outside of IPS. Although the court's findings show that the policies pursued by HACI and the Commission produced racial discriminatory effects, under *Davis* and *Arlington Heights* discriminatory impact alone does not generally demonstrate a constitutional violation.

The district court did not determine whether HACI or the Commission acted with an invidious purpose in limiting the construction of public housing to IPS. Accordingly, it will be necessary to vacate the order and remand the case to the district court to make findings whether HACI and the Commission acted with discriminatory intent. If they did, an injunctive order similar to the one appealed from would be appropriate.

But it is also possible that the actions of both agencies were totally devoid of discriminatory intent, and they failed to build public housing in the suburbs solely because suburban officials would not permit them to do so. Such a finding, however, would not end the inquiry. If it is determined that some or all of the suburbs resisted public housing or refused to cooperate with HACI's effort to go beyond the boundaries of IPS on racial grounds and with

[33] HACI was not prohibited under the order from building projects outside of IPS.

the segregative intent to confine the black people of Marion County to the "black ghetto" of the inner city, such a determination alone would justify an injunctive order similar to the one appealed from.[34]

We also remand the interdistrict busing order for the reasons outlined in this opinion. Although the district judge's previous findings and discussions indicate that he had in mind the principle stressed in *Dayton v. Brinkman*, ... U.S. .... (1977), namely, that once a constitutional violation is found, the court must tailor the scope of the remedy to fit the nature of the violation, we believe that the district court should explicitly consider the appropriate application of that principle to the formulation of any interdistrict remedy.

The orders appealed from are vacated and the case is remanded for further proceedings consistent with this opinion.

FAIRCHILD, *Chief Judge*, concurring. I interpret the directions given by the Supreme Court on remand as requiring a determination whether or not (1) the state's separation of the municipal boundary from the school district boundary was done with intent to maintain the

[34] It is true that the suburbs were not named as defendants in the IPS Board's cross-complaint. This fact is irrelevant, however, to the question of whether the requested injunctive relief should be granted against HACI. Ordinarily a person should not be held legally accountable for the action of a third party. But in the factual situation before us that axiomatic proposition is inapplicable. It does not matter whether HACI itself had a discriminatory intent in limiting public housing to ISP or whether the suburbs with discriminatory intent refused to cooperate, thus preventing HACI from expanding public housing projects beyond the IPS boundary. The result was the same and HACI, as a public agency, should not be free from an injunctive order merely because its conduct was forced from the outside. It should also be kept in mind that the remedy sought by the cross-complaint is against HACI—not against the suburbs—and therefore the inquiry may be extended to what if any suburban conduct with discriminatory intent influenced the action of HACI.

concentration of black students in IPS schools and (2) the Housing Authority's (and Commission's) choices in the location of housing were made with similar discriminatory intent. If the record required us to say as a matter of law that there was no such intent, we would reverse and direct denial of interdistrict relief and dismissal of the cross-complaint against HACI. If it required us to say as a matter of law that such intent was present, we would either affirm the decree, modify it, or reverse and remand for modification by the district court.

I agree with Judge Swygert that existence or absence of intent cannot be determined as a matter of law from the present record, particularly since that issue was not really tried, and therefore agree that we should reverse and remand for further proceedings and findings on the issue of intent. If such intent be found with respect to (1) or (2), or both, the district court should impose an appropriate interdistrict desegregation remedy. If such intent be found with respect to (2), the district court should also enter an appropriate injunction against HACI (and Commission). I concur in reversal with those directions.

I agree, generally, with Parts I and II of the opinion prepared by Judge Swygert.

With all respect, I do not subscribe to all the matters stated in Part III. In particular, I do not agree with the analysis of the issue of intent in terms of "type," "subjective test," or "standard" of intent.

I recognize, to be sure, the difficulties attendant upon determination of the "intent" with which an action is taken by a state legislature or other multi-member governmental body. It is often difficult to identify the group of individuals who controlled a particular decision and whose individual purposes in making it are therefore the most significant.

Fundamentally, however, the intent of a body of individuals with respect to a particular act of the body must be determined by the same process as an individual's intent is determined. It is to be inferred from acts (including acts and statements of individuals which can reasonably be attributed to the body) and surrounding circumstances (including foreseeable consequences of the act in question).

This is essentially a fact finding process. The Supreme Court has provided guidance in *Arlington Heights,* 429 U.S. at 266-68. As the Court stated:

> The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed.

429 U.S. at 268.

Part IV deals with the injunction entered upon the IPS cross-complaint, forbidding HACI to build future public housing within IPS. I agree that there must be a finding as to the intent with which HACI chose the locations of its projects.

Where a suburb had power to prevent HACI from locating a project within it, that suburb's attitude would be relevant in the process of finding whether HACI acted with discriminatory intent in deciding to build elsewhere. Once HACI were found, however, to have acted with discriminatory intent, it is hard to see how the guilt or innocence of various suburbs would affect the scope of an injunction against HACI.

If and to the extent that relief were sought against a suburb on a claim that it violated rights either by preventing students from attending its schools or by preventing people from obtaining housing within its borders, its discriminatory intent would, of course, be relevant.

TONE, *Circuit Judge,* dissenting. I remain of the view, stated in my dissent when the case was here before cer-

tiorari and remand, 541 F.2d at 1224, that the record contains no evidence that would support a finding of racially discriminatory purpose with respect to either Uni-Gov or selection of public housing sites. There is no need to repeat what was said there.

If the issue of discriminatory purpose had not been previously addressed by the parties or the trial court, and had first entered the case because of the Supreme Court's remand, it would be appropriate for us to remand to the District Court for the taking of evidence and findings on that issue. But that issue was previously in the case. Discriminatory purpose was specifically pleaded in paragraph 10 of the intervening plaintiffs' amended complaint, and evidence was offered in an attempt to prove that allegation after our last remand.[1] This was not an irrelevant allegation and it was not treated as such by counsel for the intervening plaintiffs, who understandably wanted two strings to their bow,[2] by counsel for the defendants, or by the district judge. The proof failed, and the district judge carefully, as I read his opinion, refrained from finding the presence of discriminatory purpose. The tenor of his findings on both the Uni-Gov and public housing issues was such that it is inconceivable that he would not have found discriminatory purpose if he had believed it warranted by the evidence. 419 F.Supp. at 182-183. In this tenth year of the litigation, I think that should be an end to the matter. The usual rule should be applied, and we should not send the case back to permit the intervening plaintiffs to make another attempt to prove allegations

[1] Which was for a determination of "whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken.*" 503 F.2d 68, 86.

[2] That the Court would hold as it did in *Washington v. Davis,* 426 U.S. 229 (1976), was, at the very least, foreseeable as a possibility. See 426 U.S. at 239-245; and see my earlier dissent, 541 F.2d at 1224.

they have already tried but failed to prove, while a complete remedy for intra-district violations conclusively adjudicated in 1973 (474 F.2d 81) is delayed on the chance that an interdistrict remedy will ultimately emerge.[3]

Turning to the issues on remand, I shall not attempt to state the respects in which I disagree with the opinion announcing the judgment of the court, which are for the most part apparent from my earlier dissent, except to say that until now the District Court and this court have recognized that the only material distinctions between the facts in this case and those in *Milliken v. Bradley* lay in Uni-Gov and the siting of public housing projects by HACI. As for Part III of the opinion, with all respect, I do not think we make the district judge's task any easier by providing him with an advisory interpretation of Supreme Court decisions (which he can read as well as we can) when we cannot agree among ourselves how they should be interpreted.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

[3] The brief for the United States filed in the Supreme Court in connection with the 1976 appeals and petitions for certiorari in that Court stated as follows:

> The United States commenced this suit to challenge racial discrimination by and within IPS. It prevailed on its claims. Full relief has been delayed for several years, however, while the district court has considered an expanded, inter-district remedy that the United States did not seek. In our view this delay has been fruitless, because the evidence has not demonstrated any purposeful inter-district racial discrimination of the sort that would justify an inter-district mandatory reassignment of students.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

DONNY BRURELL BUCKLEY AND ALYCIA MARQUESE BUCKLEY, BY THEIR PARENT AND NEXT FRIEND RUBY L. BUCKLEY, ON BEHALF OF THEMSELVES AND ALL NEGRO SCHOOL AGE CHILDREN RESIDING IN THE AREA SERVED BY THE ORIGINAL DEFENDANTS HEREIN, INTERVENING

Plaintiffs-Appellees.

v.

BOARD OF SCHOOL COMMISSIONERS OF CITY OF INDIANAPOLIS, INDIANA, ET AL.

Defendants-Appellants.

Nos. 75-1730 through 75-1737, 75-1765, 75-1936, 75-1964, 75-1965 and 75-2007.

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT.

ARGUED DEC. 3, 1975. DECIDED JULY 16, 1976

Before FAIRCHILD, Chief Judge, and SWYGERT and TONE, Circuit Judges.

SWYGERT, Circuit Judge.

This is the third review of successive desegregation orders in a suit brought in 1968 by the United States against the Board of School Commissioners of the City of Indianapolis. The issue before us, as in *Milliken v. Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), concerns the appropriate exercise of federal equity jurisdiction. The district court, 419 F.Supp. 180, found two violations of the Equal Protection Clause upon which it based the inter-district remedies that are at issue on this appeal. The first was the failure of the state to extend the boundaries of

the Indianapolis Public School District (IPS) when the municipal government of Indianapolis and other governmental units in Marion County, Indiana, were replaced by a consolidated county-wide government called Uni-Gov. The second violation was the confinement of all public housing projects (in which 98 percent of the residents are black) to areas within the boundaries of the City of Indianapolis.

On the basis of these violations the district court determined that a limited interdistrict remedy would be appropriate. The court ordered a transfer of black IPS students in grades 1-9 to suburban school districts (except two) within Marion County in such number as to cause the total enrollment of pupils in the suburban schools to be 15 percent black after the transfer. The district court also enjoined the Housing Authority of the City of Indianapolis from constructing any future public housing projects inside the boundaries of IPS and from renovating a housing project known as Lockefield Gardens for other than elderly persons.

On the basis of the entire record and the findings of the district court, we affirm.

I

The History of the Case

The history of this litigation was described in our most recent opinion, *United States v. Board of School Commissioners of City of Indianapolis, Indiana,* 503 F.2d 68, 71-75 (7th Cir. 1974), *cert. denied,* 421 U.S. 929, 95 S.Ct. 1654, 44 L.Ed.2d 86, nonetheless, a brief summary is appropriate.

There have been four phases in this suit. In *Indianapolis I* the sole issue was racial segregation within the schools in the Indianapolis Public School District. Judge Dillin, after noting Indiana's official policy of school segregation

until 1949, reviewed the conduct of IPS since that year and found the school district guilty of *de jure* segregation. *United States v. Board of School Commissioners of City of Indianapolis, Indiana,* 332 F.Supp. 655 (S.D.Ind.1971).

The court then ordered the United States to add as defendants other school districts in the metropolitan area in order to provide the proper setting for consideration of the appropriateness of a metropolitan remedy. The Government complied with the order. The Buckley plaintiffs, representing a class of black school children, were granted permission to intervene. They joined as defendants several state officials and additional school districts.

On appeal this court affirmed, finding that there was a clear pattern of purposeful discrimination in the gerrymandering of school attendance zones, in the segregation of faculty, in the use of optional attendance zones among the schools, and in school construction and placement—a "[P]attern of decision making which . . . reflected a successful plan for *de jure* segregation." *United States v. Board of School Commissioners of City of Indianapolis, Indiana,* 474 F.2d 81, 84-88 (7th Cir. 1973), *cert. denied,* 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041.

After remand from this court, the district court in *Indianapolis II* took up the problem of fashioning a remedy. One of the issues at trial was the constitutionality of the Uni-Gov Act. The court ordered a remedy without reaching this question. The court found that a meaningful permanent desegregation plan could not be accomplished within the boundaries of IPS, based upon evidence that when the percentage of blacks in a given school approaches 25 to 30 percent white flight accelerates, resulting in resegregation. *United States v. Board of School Commissioners of City of Indianapolis, Indiana,* 368 F.Supp. 1191 (S.D.Ind.1973). The court further found that the State of Indiana, its officials, and agencies by various acts and omissions pro-

moted segregation and inhibited desegregation within IPS, so that the state which was ultimately charged under the Indiana law with the operation of its public schools had a continuing affirmative duty to desegregate the Indianapolis school system.

The court then ordered a broad interdistrict remedy which encompassed the entire metropolitan area including school districts outside of Marion County. The court held it was the duty of the state, through its General Assembly, to devise its own plan of desegregation, with the understanding that if it failed to do so within a reasonable time the court would have the authority and duty to formulate its own plan. As interim relief, the court ordered IPS to effect pupil reassignments for the 1973-1974 school year sufficient to bring the number of black pupils in each of its elementary schools to approximately 15 percent.

In response to the court's order for the interim relief, IPS submitted a desegregation plan. The court rejected it as inadequate and appointed a two-member commission to develop a plan. This plan was approved by the court and has been implemented. The district court also ordered IPS to transfer to certain defendant school districts a number of black pupils equal to 5 percent of the 1972-1973 enrollment of each transferee school (with certain exceptions). (This portion of the order was stayed incident to subsequent proceedings.) *United States v. Board of School Commissioners of City of Indianapolis, Indiana,* 368 F.Supp. 1223 (S.D.Ind.1973).

In *Indianapolis III* the court issued a supplementary opinion in which Judge Dillin proffered recommendations to the State of Indiana for implementing a desegregation plan. In response, the General Assembly adopted a bill that provides for the adjustment of tuition among the transferor and the transferee districts and for the reimbursement of

transportation costs by the state whenever a federal or state court makes certain findings.[1]

On appeal from *Indianapolis II* and *Indianapolis III* this court, besides affirming the commission's interim IPS plan, affirmed the district court's holding that the State of Indiana, as the ultimate body charged with responsibility of operating its public schools, "[H]as an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries . . . ." *United States v. Board of School Commissioners,* 503 F.2d 68, 80 (7th Cir. 1974), *cert. denied,* 421 U.S. 929, 95 S.Ct. 1654, 44 L.Ed.2d 86. This court, however, in accordance with *Milliken v. Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), reversed the district court's order pertaining to the interdistrict remedy as to those school districts outside of Uni-Gov (Marion County). That portion of the order pertaining to the interdistrict remedy within Uni-Gov was vacated and remanded for further proceedings. We said:

> The district court should determine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken.* 503 F.2d at 86.

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[1] The Indiana Statute, Acts 1974, P.L. 94, § 1; I.C. 1971, 20-8.1-6.5-1, Burns Ind.Stat.Ann. § 28-5031 (1971), provides in pertinent part:

> This chapter applies solely in a situation where a court of the United States or of the State of Indiana in a suit to which the transferor or transferee corporation or corporations are parties has found the following: (a) a transferor corporation has violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders; (b) a unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor corporation, and (c) the fourteenth amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

On remand, in *Indianapolis IV*, 419 F.Supp. 183, the district court held another evidentiary hearing on Uni-Gov and housing practices within Marion County. In regard to Uni-Gov Judge Dillin found:

> The evidence clearly shows that at the time of the passage of the Uni-Gov Act in 1969, various annexation plans and school consolidation plans had bogged down on the local level because of the aforementioned opposition of the suburban school corporations within Marion County, and their patrons. . . . When the General Assembly [which under state and federal law had a duty to alleviate segregation in IPS] expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation [*sic*] IPS.

Referring to the suburban Marion County units of government, he stated:

> They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has [*sic*] been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court.

With respect to the public housing authorities the district judge said:

> The evidence is undisputed that each and every public housing project constructed and operated by the added defendant HACI is located within IPS territory, in some instances just across the street

> from territory served by one of the added defendant school corporations. Each of such locations was approved—in some instances selected in the first place—by the added defendant Commission. The latter institution has had county-wide zoning jurisdiction at all times during the construction of 10 out of the 11 public housing projects for families, and HACI has at all times had the authority to erect public housing within the City of Indianapolis, and within five miles of the corporate limits of such city. The residents of said public housing projects are approximately 98% black (except in projects for the elderly), and their children all attend school in IPS. The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory.

Based on these findings and those set forth in his former opinions, Judge Dillin ruled that an interdistrict remedy was necessary to effect desegregation within IPS. He again found that if desegregation were limited to IPS, schools within IPS would become 42 percent black, and that this percentage exceeded the "tipping point" at which resegregation would occur. He commented:

> The Court of Appeals has called the attention of this Court to the rule of law that "white flight" is not an acceptable reason for failing to dismantle a dual school system. 503 F.2d 80, citing *United States v. Scotland Neck City Board of Education*, 407 U.S. 484, 491, 92 S.Ct. 2214, 2218, 33 L.Ed.2d 75 (1970). However, it does not follow that this Court must ignore the probability of white flight in attempting to formulate guidelines for IPS to follow in accomplishing the final desegregation of its schools. In other words, as this Court sees it, white flight may not be used as an excuse for inaction; it may, however, supply the reason for a particular kind of action.

Judge Dillin therefore ordered the transfer of 6,533 students from IPS to other school districts in Marion County. An additional 3,000 students were to be transferred in the second year of the plan, raising the proportion of black students in the suburban schools to 15 percent.[2] No transfers were ordered to Washington and Pike Townships, which already had black populations of 15 and 12 percent. The district court also enjoined the Housing Authority from building any more family housing projects in IPS territory and from renovating an all black project called Lockefield Gardens. Finally, the Buckleys were awarded attorneys' fees under 20 U.S.C. § 1617.

All the defendants have appealed. The defendants other than the Housing Authority challenge the interdistrict transfers ordered by the district court. The Housing Authority challenges the injunction against it. On the other side, the Buckleys, together with an *amicus curiae,* the Coalition for Integrated Education, argue for affirmance of the district court order. The United States argues that the finding of interdistrict violations should be sustained but seeks modification of the portion of the order calling for mandatory interdistrict transfers of students. It argues for affirmance of the injunction against the Housing Authority.

II

Facts Pertinent to this Appeal

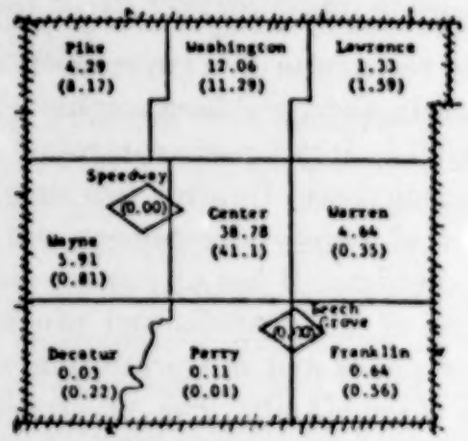
A. Residential and School Demography of Marion County

In 1969 when Uni-Gov was created, 95 percent of the blacks in Marion County lived in Indianapolis. Only about 50 percent of the whites in the county lived in the city. The black population continues to grow within the core city as reflected by the ratios in the schools. The percentage of

[2] IPS will be obligated to pay the suburban school districts the cost of educating the transferred pupils. See *supra* n. 1.

black students in IPS increased from 36 percent in 1968 to 42 percent in 1975. The 1974-1975 black/white ratio in IPS was 57.22 percent white and 42.16 percent black. On the other hand, the overall ratio in Marion County was 74.87 percent white and 24.40 percent black.[3] For the years 1974-1975 the racial composition of the suburban school districts within Marion County (other than Pike and Washington) was as follows:

1973
Percentage of Black Residents in Marion County
(Percentage of Black Students in Marion County Schools)



Township	Percentage of White	Percentage of Black
Decatur	99.83	.9
Franklin	99.35	.54
Lawrence	95.50	2.9
Perry	98.64	.23
Warren	98.61	.73
Wayne	97.87	1.19
Beech Grove	99.64	.04
Speedway	99.10	.72

[3] The black population in Marion County is reflected by the following map.

B. Uni-Gov

Until 1969 the boundaries of IPS corresponded roughly to the boundaries of the City of Indianapolis, and the other Marion County school districts were truly suburban. In 1969, however, the so-called Uni-Gov Act, which is officially titled the "Consolidated First-Class Cities and Counties Act," Acts 1969, ch. 173, § 101; I.C.1971, 18-4-1-1 *et seq.*, Burns Ind.Stat.Ann. §§ 48-9101 *et seq.* (1971), transformed Marion County into a consolidated metropolitan government. School districts were specifically excluded from Uni-Gov.

Uni-Gov is governed by a mayor and council. Its purpose was to efficiently reorganize civil government within Marion County. Previously, there had been a splintering of governmental responsibility into loosely controlled agencies with overlapping jurisdictions. Uni-Gov has succeeded to most of the functions of county government and of numerous special service districts. It has also succeeded to the functions of the City of Indianapolis and provides municipal services such as police and fire protection within the approximate area of the old city. The Act contains provisions for expanding the areas in which Uni-Gov delivers these municipal services. See, *e. g.*, I.C.1971, 18-4-12-36 (fire district); I.C.1971, 18-4-12-8 (police district).

Uni-Gov has not, however, replaced all existing governmental units in Marion County. For example, the airport authority, the county courts, the building authority, and the hospital corporation were excluded from Uni-Gov. The so-called "excluded cities" of Speedway, Perry, and Lawrence retain their own local governments which provide municipal services in those areas. Nonetheless, Uni-Gov has significant powers even in the excluded cities. It is in charge of air pollution regulation, building code enforcement, and municipal planning and thoroughfare control.

Moreover, the citizens of the excluded cities vote in Uni-Gov elections.

C. History of Public Housing

Between 1966 and 1970 the Housing Authority built and opened for occupancy ten housing projects for low-income families. These and Lockefield Gardens, which was built during the depression, are the only public housing projects for family occupancy in Marion County, although other forms of subsidized housing are available. All ten projects were built within the boundaries of IPS. These projects opened with 50 to 75 percent black occupancies and are now 98 percent black.

The Housing Authority was authorized under state law to construct projects within Indianapolis and within five miles of the city's boundaries. Federal funding could be obtained only if the Housing Authority entered into a cooperation agreement with the municipality or other civil governmental entity having jurisdiction over the territory in which it desired to build. The City of Indianapolis entered into a cooperation agreement with the Housing Authority, but no other governmental entity in Marion County did so, even though the Housing Authority approached the county commissioners about an agreement.

Since 1969, when Uni-Gov became effective, the Housing Authority has apparently had the authority to construct projects outside the old city limits, except in the Towns of Speedway, Lawrence, and Beech Grove, without the need for cooperation agreements. No housing projects have been commenced within or outside IPS since that time nor are any planned. The record does not show why. There are presently pending applications for approximately 3,000 families.

The Housing Authority argued that suitable sites did not exist outside the City of Indianapolis because services such as public transportation would have been unavailable. There was evidence, however, that these services could have been arranged. The evidence showed that public transportation routes could have been extended to areas of demonstrated need, that food stamp distribution offices could have been established at the projects, that sewage services could have been obtained by contract with the city, and that police and fire protection could have been obtained from the city.

Six of the housing projects are on the IPS boundary lines or within a few blocks thereof. For example, Clearstream Gardens was located on the IPS side of a street which divided IPS and Warren Metropolitan School District. A witness for the Housing Authority, under questioning by the district court, was unable to state why, "from the standpoint of these criteria you mentioned," there was "any difference at all between the location on the east side or the west side of Emerson Avenue." The other projects and their locations are set forth below.[4] These projects contain between 900 and 1,000 family units and house a substantial number of black school children.

D. History of School District Boundaries

Until 1969, under a variety of laws which are discussed below, the IPS boundaries were largely coterminous with the city boundaries. Under a 1931 act, the boundaries of IPS were made coterminous with those of the city. Acts 1931, ch. 94, § 1; I.C.1971, 20-3-11-1, Burns Ind.Stat.Ann.

[4] Rowney Terrace is ten blocks north of Clearstream Gardens on the same boundary line between IPS and Warren Metropolitan School District (MSD).

Raymond Villa is approximately four blocks north of the boundary line between IPS and Beech Grove.

Laurelwood is in a narrow peninsula of IPS that is surrounded on three sides by Perry MSD.

§ 28-2601 (1971).[5] Until 1959, boundaries of school districts and municipalities were also coterminous elsewhere in Indiana, with some exceptions, and the IPS boundaries merely reflected the generally prevailing condition.

In 1959 the Indiana School Reorganization Act, Acts 1959, ch. 202, § 1; I.C.1971, 20-4-1-1 *et seq.*, Burns Ind.Stat.Ann. § 20-4-1-1 et seq. (1975), created a complex scheme for consolidating school districts. Consolidations under the Act reduced the number of school districts outside Marion County from 990 to 305. Some 70 percent of the reorganized districts were not coterminous with other units of civil government. In some cases consolidated school districts crossed county lines.

Marion County, however, was an exception. School districts there were not consolidated. The Marion County Reorganization Committee, appointed pursuant to the Act, initially recommended that all school systems in the county be merged into one, but the unanimous opposition of the suburban school districts defeated the merger proposal. There is no evidence that this opposition was racially motivated.[6] The Committee's ill-fated consolidation proposal was intended to "develop equal educational opportunities

Concord Village is approximately one-half mile from the Speedway boundary.

Eagle Creek is on the boundary line between IPS and Wayne MSD.

[5] Acts 1963, ch. 310, § 4; I.C.1971, 20-3-11-33, Burns Ind.Stat.Ann. § 28-2633 (1971), provides that the 1931 act remains in effect except to the extent that its various provisions are inconsistent with the 1959 act discussed in the text. The provision of the 1931 act making IPS boundaries coterminous with those of Indianapolis is inconsistent with the 1959 act and consequently was not reenacted by the 1963 act. The 1963 act did not purport to affect the provisions of the 1961 act discussed in the text.

[6] The district judge's comment is pertinent. "In fact, the evidence shows that, with a few exceptions, none of the added defendants have had the opportunity to commit such overt acts because the Negro population residing wtihin the borders of such defendants ranges from slight to none, . . ." *United States v. Board of School Commissioners*, 368 F.Supp. at 1203.

for all children in Marion County," and to "eliminate the confusion of school transfers and dislocations involved in annexation proceedings."

The most substantial reasons against consolidation noted in the Committee's report were that a consolidated school district would be large, with consequent loss in citizen participation and interest in school affairs, and that merger would result in increased school taxes in IPS and two of the suburban districts. The Committee explained that the consolidation plan "had no widespread support—only organized opposition," and that it did not wish to "force a plan (however sound in its conception) upon an unwilling or reluctant public." So, although it believed the arguments in favor of its plan far outweighed the opposition arguments, the Committee, as the district court found, "[R]eversed itself and proposed a plan which, with minor exceptions . . . froze all existing school corporations in Marion County according to their then existing 1961 boundaries." *United States v. Board of School Commissioners,* 368 F. Supp. 1191, 1203 (S.D.Ind.1973). The Committee thereby abandoned both its merger plan and a less radical plan which would have restructured school boundaries on what the Committee regarded as a more rational basis than existing boundaries. Accordingly, the plan adopted in 1962, after approval by the state, did not significantly change boundaries in Marion County, but left those boundaries coterminous with those of civil governmental bodies.

As a result of the 1959 Reorganization Act, school boundaries in most of the state were frozen and thereafter unaffected by municipal annexations. In 1961, however, special legislation was enacted to give the schools within Marion County the flexibility lost by the 1959 Reorganization Act. Acts 1961, ch. 186, § 1; I.C.1971, 20-3-14-1 *et seq.,* Burns Ind. Stat.Ann. § 28-3610 (1971). Under the 1961 act extension of the boundaries of a civil city automatically extended the

corresponding school district boundaries unless the school city and the losing school corporation mutually agreed that the school city territory would not expand with the civil city. The school district whose territory was to be taken could also oppose the civil annexation in a remonstrance suit. The annexation powers of the city, however, proved to be illusory, for they were effectively frustrated by remonstrance litigation.[7]

Another means of annexation under the 1961 act was by mutual agreement between school corporations. IPS (and other school districts with boundaries corresponding with those of a civil city) also had a unilateral power of annexation subject to the right of the school district whose territory was to be taken to oppose by remonstrance. No significant action was taken by IPS under this provision.

In summary, until 1969, the combined action of the State of Indiana and its political subdivisions had the effect of leaving the boundaries of the City of Indianapolis and IPS substantially the same despite statewide school district consolidations made under the 1959 act. True, IPS could expand independently of the city, but the city's annexation prima facie carried IPS with it. Although it turned out that no annexations occurred, the policy of the state, as expressed in the 1961 legislation, was that IPS would expand along with the city.

In 1969, after this action was filed, two other acts were adopted. One act, Acts 1969, ch. 52, § 3; I.C.1971, 20-3-14-9, Burns Ind.Stat.Ann. § 28-3618 (1971), adopted sixteen days before Uni-Gov was enacted, amended the 1961 act by abolishing the power of IPS to follow municipal annexations. Another act, Acts 1969, ch. 239, § 407; I.C.1971, 18-5-10-25,

[7] This frustration of the city's annexation efforts was one of the reasons for Uni-Gov given by Mayor Lugar in his testimony before the district court.

Burns Ind.Stat.Ann. § 48-722 (1971), limited the remonstrances against municipal annexations to a few, simple, fairly objective grounds.

III

[1] The overall issue in this appeal is whether the limited interdistrict remedy ordered by the district court is supported by the record and is in accord with the legal principles enunciated in *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). Subsumed in the issue are two questions: (1) whether the establishment of Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy within Uni-Gov, and (2) whether the district court correctly enjoined the Housing Authority of the City of Indianapolis from locating any additional publicly funded housing projects within the boundaries of IPS and from renovating any existing facility for other than the elderly.[8]

[8] The school district defendants argue that our mandate limited inquiry on remand to Uni-Gov itself. It is true that our remand "[F]or further proceedings consistent with" *Milliken v. Bradley* was qualified by the specific direction to "[De]termine whether the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an inter-district remedy within Uni-Gov in accordance with *Milliken*." *United States v. Board of School Commissioners*, 503 F.2d 68, 86 (7th Cir. 1974), *cert. denied*, 421 U.S. 929, 95 S.Ct. 1654, 44 L.Ed.2d 86. This direction, however, was itself qualified by a footnote quoting from passages in the opinion of the Court in *Milliken* and in Mr. Justice Stewart's concurring opinion. Both passages mention the drawing of school district lines on the basis of race as a possible ground for interdistrict relief; the former also includes as a possible ground discriminatory acts of other school districts; and the latter mentions "[P]urposeful, racially discriminatory use of state housing or zoning laws" by state officials. *Id.* at n. 23. We interpret the mandate as sufficiently broad to permit consideration of official conduct which arguably bears a historical relationship to the failure to expand the IPS boundaries to match those of Uni-Gov, which includes the failure to change IPS boundaries during the 1959-1962 Indiana school reorganization program and the failure to locate any public housing outside the IPS boundaries. On the intervening plaintiffs' theory of the case, which the district court adopted, this course of conduct was a part of a pattern, of which Uni-Gov was also a part.

In our opinion, *Milliken's* essential holding is contained in the following language written by Mr. Chief Justice Burger:

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann v. Charlotte-Mecklenburg Brd. of Education*, 402 U.S. 1, at 16, 91 S.Ct. 1267, at 1276, 28 L.Ed.2d 554. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces significant segregative effect in another district. *Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation.* Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy. (emphasis added.) *Milliken v. Bradley*, 418 U.S. 717, 744-45, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069.

That holding was further explicated in *Hills v. Gautreaux*, 425 U.S. 284, 296, 96 S.Ct. 1538, 1545, 47 L.Ed.2d 792 (1976), where Mr. Justice Stewart wrote:

> The Court's holding that there [*Milliken v. Bradley*] had to be an interdistrict violation or effect before a federal court could order the crossing of district boundary lines reflected the substantive impact of a consolidation remedy on separate and inde-

pendent school districts. The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional violation.

In *Milliken* the majority opinion also noted that, "[I]n its present posture, the case does not present any question concerning possible state housing violations." *Milliken v. Bradley, supra,* 418 U.S. at 728, n. 7, 94 S.Ct. at 3119. Mr. Justice Stewart, in his concurring opinion, explicitly explained the relevance of housing discrimination as it relates to an interdistrict remedy in school desegregation cases. Mr. Justice Stewart wrote:

> Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, . . . by transfer of school units between districts, . . . or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate. *Id.* at 755, 94 S.Ct. at 3132.

With these holdings in mind we turn to the issue of Uni-Gov as it relates to an interdistrict violation.

Although Uni-Gov was a neutral piece of legislation on its face with its main purpose to efficiently restructure civil government within Marion County, it cannot be analyzed in isolation if its impact on school district boundaries is to be clearly perceived. Rather it must be considered in conjunction with the two other acts adopted in 1969. (See *supra* pp. 1217-1218.)

For some time Mayor Lugar had expressed his desire to embark on a more aggressive annexation program in

order to bring a greater part of the urbanized area under the city's control. The concept of Uni-Gov was promoted as a more viable alternative to lengthy annexation litigation.[9] The suburban school corporations and their legislative representatives were obviously aware that if Uni-Gov did not pass and the civil city was forced to embark on a more aggressive annexation program as a last resort to reorganizing governmental services, IPS boundaries would automatically extend with the civil city boundaries under the 1961 Annexation Act.[10] In order to avoid this undesired result Chapter 52, 1969 Acts was enacted sixteen days before Uni-Gov was adopted. This Act repealed the provision in the 1961 Act which provided for automatic extension of school city boundaries with the extension of civil city boundaries. Chapter 239, 1969 Acts was also adopted, limiting remonstrances against municipal annexations to a few, simple, fairly objective grounds.

It must be kept in mind that at this time both the General Assembly and the suburban school districts knew that this action was pending in district court. These "fail safe" measures indicated a legislative intent (reflecting local sentiments) that by one means or aonther the boundaries of IPS would not expand with those of the civil city. We say this because a court is entitled to draw reasonable and logical inferences from probable consequences of changes in the law and the evident purpose of such changes.

Because, in 1969, 95 percent of the blacks in Marion County lived in the inner city and segregation in its schools was

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[9] Prior city administrations had not strongly pursued civil annexations and those that had been adopted were being effectively thwarted by remonstrances in the courts.

[10] Under the 1961 Annexation Act the only way to avoid automatic extension of the school city boundaries, other than by remonstrance, was by mutual agreement between the acquiring and losing school corporations that the school city boundaries would not extend with the civil city boundaries.

under attack in federal court, it is clear to us that Uni-Gov and its companion 1969 legislation were "[A] substantial cause of interdistrict segregation." *Milliken v. Bradley*, 418 U.S. 717, 745, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974), and "[C]ontributed to the separation of the races by . . . redrawing school district lines. . . ." *Id.* at 755, 94 S.Ct. at 3132. (Stewart, J., concurring).

[2, 3] The General Assembly, under both federal law as expressed in *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and in *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), and Indiana law as expressed in Acts 1949, ch. 186, §§ 1-6, 8, as amended Acts 1973, P.L. 218, § 1; I.C.1971, 20-8.1-2-1—20-8.1-2-7, Burns Ind.Stat.Ann. § 28-5304 (1971), had an obligation to alleviate the segregated condition in IPS. The record fails to show any compelling state interest that would have justified the failure to include IPS in the Uni-Gov legislation. The desirability for a unitary civil government should not have precluded the General Assembly from considering the needs of the school system in its decision to enact Uni-Gov. As we noted earlier, the most substantial reasons advanced against the consolidation of the schools in Marion County when it was under consideration in 1959 were that a consolidated school district would be large, with consequent loss of citizen participation, and that it would increase taxes. These considerations, although apparently not racially motivated, cannot justify legislation that has an obvious racial segregative impact. Administrative convenience cannot be a justification for violating the Equal Protection Clause. The district court correctly observed, "When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with [*sic*] IPS."

In summary, we are convinced that the essential findings for an interdistrict remedy found lacking in *Milliken* are supplied by the record in the instant case. In *Milliken* the Supreme Court noted that the Detroit school boundaries were coterminous with the civil city boundaries and "[W]ere established over a century ago by neutral legislation. . . ." *Milliken v. Bradley*, 418 U.S. 717, 748, 94 S.Ct. 3112, 3129, 41 L.Ed.2d 1069 (1974). The Court also observed the district court did not find that the segregative acts within Detroit effected segregation within the other districts. *Id.* at 721, 94 S.Ct. 3112. Furthermore, the suburban school districts had not participated in the proceedings, *id.* at 722, 94 S.Ct. 3112, and finally, there had been no evidence of any racially discriminatory acts of the state which had been substantial causes of interdistrict segregation, *id.* at 745, 94 S.Ct. 3112. The remedy chosen by the district court required a consolidation of fifty-four districts "into a vast new super school district," *id.* at 743, 94 S.Ct. at 3126.

Indianapolis presents an entirely different situation. The Indianapolis Legislature acted directly in passing Uni-Gov, thereby creating the existing situation which confines black students within IPS. Moreover, the suburban governmental units made it politically expedient that Uni-Gov not include the schools.

[4] In this case we are dealing with a situation in which but for certain events chargeable to the state, Marion County would be either a consolidated school district under the 1959 School Reorganization Act or IPS would have been expanded with the civil city of Indianapolis under Uni-Gov. In this context there is nothing talismanic about the word "district", for school district lines are not sacrosanct. *Milliken, supra* at 744, 94 S.Ct. 3112. The following hypotheticals are helpful in analyzing the problem.

(a) City A has one school district, coterminous with City A. The Government brings a suit, alleging *de jure* segregation in the city schools, particularly in the northeast portion of the city. The defendant school board agrees that the northeast portion of the city must be desegregated, but argues that a districtwide remedy is unnecessary, that is, that only the schools in the northeastern portion of City A need be affected. On these facts, *Keyes v. School District No. 1,* 413 U.S. 189, 208, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973), would control.

(b) City B has one school district that is coterminous with city boundaries. Perhaps fearing an impending desegregation suit, City B decides to contract its school district boundaries so that the school district encompasses the bulk of the central city while the outlying areas of the city organize their own school districts. On these facts, no federal court in a desegregation suit would hesitate in ordering the crossing of district lines to effect a remedy.

(c) City C decides to expand its boundaries and annexes the suburbs surrounding it into a unitary civil government. However, it retains its school district boundaries, previously coterminous with its former city boundaries. In every other respect it provides full city services in and exercises full city authority over the newly acquired territory. These facts are analogous to those of the case at bar. In the event of a meritorious desegregation suit in hypothetical City C, a district court could properly order an inter-district remedy under *Milliken.*

There is no dispute that a school district may not contract its territory in order to avoid desegregation. *Cf. Wright v. Council of City of Emporia,* 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed.2d 51 (1972). Conversely, a city should not be permitted to extend its boundaries in order to avoid desegregation.

Evans v. Buchanan, 393 F.Supp. 428 (D.Del.1975), *aff'd,* 423 U.S. 963, 96 S.Ct. 381, 46 L.Ed.2d 293 (1975), is a case

which is factually analogous to the instant case in many respects and in accord with *Milliken.* In *Evans* the district court had to consider the segregative effects of the Education Advancement Act of 1968, a Delaware school reorganization statute, which explicitly excluded the Wilmington district from a general reorganization of Delaware school districts. Although the district court concluded that the provisions excluding the Wilmington district from school reorganization were not purposefully, racially discriminatory, this did not end its inquiry. The court noted, "Statutes that do not explicitly deal with race but have a pronounced racial effect, . . . can also establish suspect racial classifications." *Evans v. Buchanan, supra* at 441. It further stated that "[W]here a statute, either explicitly or effectively, makes the goals of a racial minority more difficult to achieve than other related governmental interests, the statute embodies a suspect racial classification and requires a particularly strong justification." *Id.* The court therefore held that the Education Advancement Act, although racially neutral on its face, "[H]ad a significant racial impact on the policies of the State Board of Education, . . ." *id.* at 442-443, and thereby constituted a suspect classification. In effect, the statute prevented a predominantly black school district from being reorganized with a predominantly white suburban school district while other districts in the state were able to consolidate. The court finally concluded that "Neither . . . interest in preserving a historic school district boundary, nor the interest in maintaining districts with enrollments below 12,000 . . .," *id.* at 445, was a compelling state interest and did not justify the exclusion of Wilmington in the Education Advancement Act. On this basis the district court ordered an interdistrict remedy. The Supreme Court summarily affirmed.

In light of the above we find that the limited interdistrict remedy ordered by the district court was proper.

IV

We now turn to the housing issue. As we stated above 95 percent of the black residents of Marion County live in the inner city. Surrounding the inner city are suburbs populated largely by white residents. This phenomenon may have many causes, but we think the district judge was correct in finding as the primary reason discrimination in the availability of housing opportunities for blacks in the suburbs. We are in agreement with Judge Dillin's statement:

> Although it is undoubtedly true that many factors enter into demographic patterns, there can be little doubt that the principal factor which has caused members of the Negro race to be confined to living in certain limited areas (commonly called ghettos) in the urban centers in the north, including Indianapolis, has been racial discrimination in housing which has prevented them from living any place else. *United States v. Board of School Commissioners*, 368 F.Supp. 1191, 1204 (S.D.Ind.1973).

Although the Housing Authority had jurisdiction outside the IPS boundaries, it did not locate any of the public housing projects in that territory. Instead, all ten of the public housing projects whose occupancy is 98 percent black were located within IPS. It is obvious that there is a close relationship between the racial balance in housing and the racial balance in schools. As Judge Dillin found in his 1971 opinion, "Low-rent housing projects within the School City have significantly affected the racial composition of the schools." *United States v. Board of School Commissioners*, 332 F.Supp. 655, 673 (S.D.Ind.1971). He reaffirmed this in his most recent decision, "The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory." The record supports these findings and clearly shows a "purposeful, racially discriminatory use of state housing." *Milliken v. Bradley*, 418

U.S. 717, 755, 94 S.Ct. 3112, 3132, 41 L.Ed.2d 1069 (1974) (Stewart, J., concurring). The Government's statement in its brief supports this view:

> Given that a disproportionate number of blacks are both in low income categories and were already concentrated in IPS and considering the predominantly black composition of the pool of applicants for the H.A.C.I. low-income housing projects, it is a reasonable inference that this action would and did have a further impact upon the racial compositions of schools and school districts in Marion County.

[5] The Housing Authority contends the district court had no authority to enjoin it from building additional public housing within IPS and from renovating Lockefield Gardens for other than the elderly because the court could not lawfully find a constitutional violation by HACI in confining its housing projects to IPS territory. The evidence presented above, however, is to the contrary.

By locating its projects within IPS and in many cases near all black neighborhoods, the Housing Authority significantly contributed to the disparity in residential and school populations between the inner city and the suburbs. Its acts produced discriminatory effects both within IPS and the suburbs. The relief ordered by the district court was directed to correcting the effects of those past discriminatory acts. Accordingly, the district court did not abuse its discretion in enjoining the Housing Authority from building additional projects within IPS. That part of the injunction that relates to Lockefield Gardens was also proper since permitting it to be used for family housing, where school children are undoubtedly involved, would only further aggravate the school segregation problem.

V

[6] The Government contends that the mandatory transfer of students between IPS and the suburban schools ordered by the district court is improper. After conceding the import of *Milliken*, the propriety of interdistrict relief, and noting the specific finding of facts found by the district court to have substantially caused segregation in the other districts, the Government concludes the district court's order was an abuse of discretion. We are confused by the Government's reasoning. We fail to see how the district court abused its discretion when it was clearly acting within the guidelines of *Milliken*. It was not an abuse of discretion merely because the Government would have preferred another remedy.

Furthermore, the Government's arguments are inconsistent. On the one hand, it demands that segregation be eliminated root and branch from within IPS; on the other, it condemns the only relief which can make its demand a reality. We are surprised the Government seriously offers voluntary transfer as an alternative to mandatory transfer as a means to effectuate its goal of complete desegregation. History has taught us that "freedom of choice" plans produce negligible results. *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1967).

Even if we were to agree with the Government that voluntary transfers are desirable, Indiana law provides no secure mechanism for achieving this result. The Government suggests that voluntary transfers can be made in accordance with Acts 1973, P.L. 218, § 1; I.C. 1971, 20-8.1-6-1, Burns Ind.Stat.Ann. § 28-5001 (1971), which permits transfers under certain conditions.[11] We do not agree, however,

[11] The statute provides:

Transfer—General order.—The governing body of any school corporation may grant an order of transfer upon proper application by the parent of any child who resides in that corporation if it feels the child may be better accommodated in the public schools of another school corporation of this state or of an adjoining state. In determining whether a child can be better accommodated, such matters as the proximity of the schools to the residence of the child desiring the transfer, the kind and character of the roads, the means of transportation, and the crowded conditions of the school shall all be pertinent.

If there is no high school in the school corporation in which a child resides, the governing body shall grant an order of transfer. When a transfer is granted under this section, transfer tuition shall be paid as provided in this chapter.

that this law is sufficient to provide for the kind of transfers the district court ordered. The language in the statute is permissive and vague (a transfer *may* be granted if the school corporation feels a child may be better accommodated in another school) and does not contemplate transfers for desegregation purposes. We could hardly believe we were carrying out our duty to dismantle segregation root and branch if we were to choose this law to accomplish our goal.

The limited interdistrict remedy ordered by the district court is supported by the record and in accord the legal principles enunciated in *Milliken*.

In affirming the district court's order, we suggest that the court monitor the transference of black pupils from IPS to the other school districts periodically, perhaps on a yearly basis, in order that modifications, if necessary, may be made. This is in the hope that segregation and discrimination will be completely eradicated within IPS in furtherance of the goal of equal opportunity proclaimed two hundred years ago in the Declaration of Independence.[12]

[12] Supplementing Judge Tone's footnote to his dissent, the author of this opinion acknowledges extensive borrowing from Judge Tone's original draft of an opinion, particularly with respect to the factual background of this case. That use made my task easier, and I am indeed grateful.

AFFIRMED.

TONE, Circuit Judge, dissenting.*

There are only two possible interdistrict constitutional violations, in view of our decision on the second appeal, *United States v. Board of School Commissioners,* 503 F.2d 68 (7th Cir. 1974), *cert. denied,* 421 U.S. 929, 95 S.Ct. 1654, 44 L.Ed.2d 86 (1975), as the majority recognizes. These two possibilities are Uni-Gov and the Housing Authority's location of public housing, as to both of which the District Court heard evidence and made findings on remand.

Whether these state actions violated the Equal Protection Clause depends upon the existence of a racially discriminatory purpose. Disproportionate effect on minorities without discriminatory purpose is not enough. If this was not clear after *James v. Valtierra,* 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed.2d 678 (1971), *Jefferson v. Hackney,* 406 U.S. 535, 548-549, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972), and *Keyes v. School District No. 1,* 413 U.S. 189, 208, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973), it was made so by *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). The Court squarely held in the latter case that equal protection is denied only when the state acts with a racially discriminatory purpose:

> "[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose,

* The writing of the court's opinion was initially assigned to me, my tentative vote at conference having been to affirm. After I had devoted much time toward the preparation of an opinion, I came to the view reflected in this dissent. The writing of the court's opinion was therefore reassigned to Judge Swygert, who was already burdened with his share of the work of the Seventh Circuit but nevertheless had to find time for this case. While the results of my work on the record, which I made available to him, were I hope of some use in connection with the writing of his opinion, he got a very late start because of the circumstances just described. I recite this intramural history to record the reason for the unusual delay between oral argument and decision and the fact that Judge Swygert is not responsible for that delay.

> is unconstitutional *solely* because it has a racially disproportionate impact. [Original emphasis.]
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> "The school desegregation cases have . . . adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause.
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> • • • • • •
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> ". . . Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." 426 U.S. at 239-242, 96 S.Ct. at 2047-2049.

The record before us does not contain findings or evidence that the state acted with a racially discriminatory purpose in connection with Uni-Gov or public housing siting.[1] An essential element of an equal protection violation is therefore missing.

[1] The criterion of racially discriminatory purpose is, of course, often not easy to apply. Even if, in any given case, a body such as a legislature or school board can be said to have a collective intent (see R. Dickerson, *The Interpretation and Application of Statutes* 67, *et seq.* (1975)), that intent is often difficult to ascertain. See Justice Powell's concurrence in *Keyes,* 413 U.S. at 217, 233-234, 93 S.Ct. 2686. For this reason Justice Stevens, concurring in *Washington v. Davis,* — U.S. at —, 96 S.Ct. at 2054, observed that "the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume," and based his concurring vote, in a manner reminiscent of Justice Harlan's concurring opinion in *Hunter v. Erickson,* 393 U.S. 385, 393, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), on the objective indicia that the governmental action was grounded on neutral principle. In the case at bar, this problem is not as knotty as it often is. Uni-Gov satisfies the neutral principle standard, and the search for collective legislative intent, which able counsel must have made, seems to have turned up no evidence whatsoever of racially discriminatory purpose on the part of anyone responsible for the legislation. The housing siting decisions are in a similar posture.

One other governing principle should be noted at the outset. *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), in language we are not free to ignore, focused on the constitutional right to be vindicated. Amplifying the statement quoted by the majority that "the scope of the remedy is determined by the nature and extent of the constitutional violation," *id.* at 744, 94 S.Ct. at 3127, the Supreme Court said two pages later:

> "Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system. . . .
>
> "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit District to attend schools in Oakland and Macomb Counties, they were under no constitutional duty to make provisions for Negro students to do so. The view of the dissenters, that the existence of a dual system in Detroit can be made the basis for a decree requiring cross-district transportation of pupils, cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent." *Id.* at 746-747, 94 S.Ct. at 3128 (footnote omitted).

That *Milliken* controls here, apart from the additional evidence on Uni-Gov and public housing, was of course recognized in our decision on the second appeal, in which we reversed the portion of the District Court's order calling for interdistrict relief outside the Uni-Gov territory. That decision was a recognition that, in the language of *Milliken*, "[t]he constitutional right of the Negro respondents residing in [IPS] is to attend a unitary school system in that district," *id.*, and an interdistrict remedy is not an appropriate means of vindicating that right. The question now is: What other constitutional rights, violation of which calls for an interdistrict remedy, were shown on remand to have been violated by Uni-Gov and the siting of public housing projects? The majority does not seem to me to answer that question.

The District Court did not find that the legislative decision to exclude IPS from Uni-Gov was racially motivated.[2] The record would not have supported such a finding in view of both the absence of any direct evidence of such a motivation and the presence of such evidence as the historic context of opposition to county-wide school consolidation on non-racial grounds,[3] the decision to leave other government

[2] Such a finding cannot be inferred from the District Court's statement that by not consolidating the schools under Uni-Gov, the General Assembly "signaled its lack of concern with the whole problem and thus inhibited desegregation with[in] IPS." Apart from doubt about whether there is any evidence that Uni-Gov had an inhibiting effect on desegregation, as distinguished from not promoting desegregation, the court has merely described an effect and not a purpose. A "lack of concern" does not amount to a racially discriminatory purpose. The state, like Michigan in *Milliken*, was under no direct constitutional duty to adopt interdistrict measures, and a duty to act could hardly arise from the fact that failure to act would "signal a lack of concern."

[3] There is no evidence, as the majority recognizes, that the opposition to consolidation of Marion County School districts under the Indiana School Reorganization Act of 1959 (Ind. Code § 20-4-1-1, *et seq.*) was racially motivated. Nor is there any evidence that the failure to consolidate after that time or opposition to civil annexation was racially motivated. The District Court, in the course of the hearing on remand after our decision on the second appeal, spoke of the purpose of certain exhibits as being offered "to prove or tend to prove that the present division of Marion County into eleven separate school districts is something that happened because of reasons pertaining primarily to school finances as well as to the desire of non-IPS schools to maintain local autonomy rather than for reasons of separating students based on race. . . . I presume that if the Government or the intervening plaintiffs had some evidence to the contrary that they would be cross-examining, or examining along those lines." Neither the government nor the intervening plaintiffs offered any "evidence to the contrary" or cross-examined along the lines referred to.

units out of Uni-Gov,[4] the fact that all school boundaries elsewhere in the state were already frozen, and the non-racial reasons and the haphazard fashion in which civil annexation had taken place in the past, which had done nothing to establish rational school boundaries.[5] The appellees do not argue that the evidence shows a racially discriminatory purpose. In their briefs, filed before the decision in *Washington v. Davis*, the government assumes, and the intervening plaintiffs argue, that such a purpose need not be shown.

A search in the opinion of this court's majority for a finding of racially discriminatory purpose will be unproductive. The majority finds (text at notes 9 and 10) that the General Assembly did not want IPS boundaries to expand with the city boundaries whether or not Uni-Gov was adopted[6] but does not follow with a statement that this

[4] Among those other governmental units were the Airport Authority, the Health and Hospital Corporation, the County Department of Welfare, the Building Authority, and the Library Districts. See Ind.Code § 18-4-3-14. The so-called "excluded cities" of Speedway, Perry, and Lawrence retained their own local governments, which provide municipal services in those areas, although Uni-Gov has the responsibility even in those areas for air pollution regulation, biulding code enforcement, municipal planning, and thoroughfare control.

[5] The record indicates that the reasons for this and the resulting irregularities in the boundaries of Indianapolis were that in many instances residents protested annexation because they felt the city would not provide them with services commensurate with the additional tax money they would be paying (not an uncommon reason for opposition to annexation by municipalities large and small throughout the country), and in other instances commercial developers sought and gained the annexation of land they owned because they wanted benefits that could be obtained through annexation. Thus whether this land was annexed depended in large part upon the position taken by the owners of the land affected.

[6] This inference is drawn from the adoption of Chapter 52, 1969 Acts (Ind.Code § 20-3-14-9) seven days before the adoption of Uni-Gov and the adoption of Chapter 239, 1969 Acts (Ind. Code § 18-5-10-25). The effect of these two acts was to eliminate the automatic expansion of IPS boundaries to match the expansion of city boundaries and to limit remonstrances against annexations. These acts were rendered nugatory by the adoption of Uni-Gov.

desire or the actions effectuating it were racially motivated. Instead it goes on to state, citing *Milliken*, that "Uni-Gov and its companion 1969 legislation were 'a substantial cause of interdistrict segregation' . . . and 'contributed to the separation of the races by . . . redrawing school lines . . . .' "[7] But under *Milliken*, as explained in *Washington v. Davis*, cause and effect are not enough. A racially discriminatory purpose is necessary. The closest the majority comes to finding a racially discriminatory purpose is in the abstract statement, at the end of the paragraph containing the three hypotheticals, that "a city should not be permitted to extend its boundaries in order to avoid desegregation." I believe that if this court intended to find as a fact that Uni-Gov was adopted with a racially discriminatory purpose, in the face of the failure of the District Court to find, and of the appellees to argue, that there was such a purpose, it would do so directly and state the evidentiary basis for that finding. As stated above, I believe there is no such basis in the record.

The majority attempts to avoid the necessity of finding discriminatory purpose by postulating an affirmative duty to desegregate under *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), and the Indiana statutes. It is doubtful that the Indiana legislature could impose on itself by statute the duty to pass additional statutes, and, if it could, violation of such a duty would not give rise to a federal constitutional claim. *Milliken's* teaching is that the state's constitutional duty under *Green* is commensurate with the violation, which, apart from the Uni-Gov events themselves, was a violation of the right to attend a unitary school system within IPS. Under

[7] Failing to redraw the school district lines does not seem to me to be "redrawing school district lines," but this is not important to an analysis of the problem, because the controlling question is whether, however the legislature's action is described, it was taken with a racially discriminatory purpose.

Milliken, there can be no affirmative duty to use interdistrict means to remedy intradistrict violations; for if such a duty existed, the State of Michigan surely violated it in that case, which would have mandated the interdistrict remedy rejected by the Supreme Court, and there was no reason in the case at bar to exclude the territory outside Uni-Gov from the scope of our remand on the second appeal.

Evans v. Buchanan, 393 F.Supp. 428 (D.Del. 1975), *aff'd*, 423 U.S. 963, 96 S.Ct. 381, 46 L.Ed.2d 293 (1975), on which the majority relies, does not in my opinion support affirmance. That case, unlike the case at bar, involved a prior interdistrict violation mandating the adoption of interdistrict measures by state authorities. The district court opinion in *Evans* shows *de jure* segregation before *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), was practiced on an interdistrict basis in the Wilmington area. 393 F.Supp. at 437. The state failed to carry its burden of showing that these past acts of segregation had become so attenuated that "the current segregation is in no way the result of those past segregative actions," *Keyes v. School District No. 1, supra*, 413 U.S. at 211 n.17, 93 S.Ct. at 2699; in fact, post-*Brown* acts contributed to continued interdistrict segregation, see 393 F.Supp. at 434-436. Consequently, there was an affirmative duty to remedy the interdistrict violation, and the Delaware reorganization statute, by barring consolidation as a way of doing so, "contravene[d] the implicit command of *Green v. County School Board* . . . that all reasonable methods be available to formulate an effective remedy." *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46, 91 S.Ct. 1284, 1286, 28 L.Ed.2d 586 (1971).

The majority relies on the "racial impact" theory espoused by the district court in *Evans*. The summary affirmance of the three-judge district court's judgment does not necessarily imply approval of that court's reasoning,

and that reasoning clearly cannot stand after *Washington v. Davis*.

In short, there is no finding and no evidence that the exclusion of IPS from Uni-Gov was racially motivated, and by all objective criteria Uni-Gov was racially neutral state action. Uni-Gov left untouched the boundaries of IPS, which had been established for racially neutral reasons. The changes in civil boundaries and reallocations of civil governmental functions made by Uni-Gov had no effect on the constitutional rights of school children in IPS.

Public Housing

The District Court, while unconvinced by the reasons given for the selection by the Housing Authority of certain sites near the periphery of the City of Indianapolis, made no findings that any of the Housing Authority's decisions were racially motivated. As the majority notes, under federal statute (42 U.S.C. § 1415(7)(b)(i)) and HUD guidelines, the Housing Authority could not obtain federal funds for a project in the absence of a cooperation agreement with the local governmental authority obligating the latter to provide essential governmental services; and as the District Court found, "Suburban Marion County officials have refused to cooperate with HUD on the location of such projects." It is apparent from the record and the District Court's findings that this was the real reason housing projects were built only within the City of Indianapolis before the effective date of Uni-Gov. There was no finding and no evidence that the refusals were racially motivated. Failure of local authorities to enter into these agreements, without more, does not give rise to an inference of racially discriminatory purpose, even though the projects are to be occupied by large numbers of blacks. See *James v. Valtierra*, *supra*, 402 U.S. at 141, 91 S.Ct. 1331; see also *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 517 F.2d 409, 412-413 (7th Cir. 1975), *cert. granted*, 423

U.S. 1030, 96 S.Ct. 560, 46 L.Ed.2d 404 (1975). As these cases hold, the state's location of low-rent housing projects for racially neutral reasons, even though it has a disparate effect on minority groups, is not subject to strict scrutiny. *James v. Valtierra, supra*, 402 U.S. at 141, 91 S.Ct. 1331; *Metropolitan Housing Development Corp. v. Village of Arlington Heights, supra*, 517 F.2d at 413.[8] As the majority notes, the record is silent as to why no housing projects were commenced within IPS since the effective date of Uni-Gov. Absent a showing of discriminatory intent, I find no ground on which to sustain the injunction against the Housing Authority.

Relief

In the absence of an interdistrict violation, there should be no interdistrict relief against the school corporation defendants. If I believed the majority were correct in finding interdistrict violations, I would agree that the remedy ordered by the District Court is within its discretion and would not have this court substitute its discretionary judgment for that of the District Court by ordering only the voluntary-transfer remedy urged by the government. In

[8] The majority does not rely on other acts of the state and private parties that had the effect of confining blacks to the IPS area, to which the brief of the United States refers. These acts which include recording racial covenants, discriminatory FHA loan practices and private discrimination by brokers, sellers, and others, were referred to by the District Court as "customs and usages of both the officials and inhabitants of such areas" which "discourage[d] blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court." While the District Court was no doubt correct in this statement, the findings referred to and the evidence supporting it were all in the record at the time of the last appeal, when we held that *Milliken* precluded relief outside Marion County, and are similar to findings and evidence in *Milliken*. See 418 U.S. at 724, 728 n.7, 94 S.Ct. 3112. If these facts had sufficed to justify an interdistrict remedy, the Supreme Court in *Milliken* would presumably either have affirmed on the familiar principle that a reviewing court will affirm on any basis supported by the record, even if not relied on by the lower court, or else would have remanded for further consideration of the housing issue. See, *e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 475 n.6, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

this connection, I do note that even when no constitutional violation has occurred, Indiana law provides relief to a student who is prevented by school district lines from attending the school nearest his home, Ind.Code § 20-8.1-6-1, *et seq.*, and the school authorities seem to be obligated to grant such relief, *State ex rel. Smitherman v. Davis*, 238 Ind. 563, 571, 151 N.E.2d 495, 498 (1958).

I further believe that since the Housing Authority, unlike HUD in *Hills v. Gautreaux*, 425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976), has not been found to have engaged in purposefully discriminatory and therefore unconstitutional conduct, no relief against that agency is warranted.

UNITED STATES of America, Plaintiff,

Donny Brurell Buckley and Alycia Marquese Buckley, by their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein, Intervening-Plaintiffs,

v.

The BOARD OF SCHOOL COMMISSIONERS OF the CITY OF INDIANAPOLIS, INDIANA, et al., Defendants,

Otis R. Bowen, as Governor of the State of Indiana, et al., Added Defendants,

Citizens For Quality Schools, Inc.,

Intervening-Defendant,

Coalition For Integrated Education,

Amicus Curiae.

The BOARD OF SCHOOL COMMISSIONERS OF the CITY OF INDIANAPOLIS, INDIANA, Cross-Claimants,

v.

The METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY and

The Housing Authority of the City of Indianapolis, Cross-Defendants.

IP 68-C-225.

United States District Court,
S. D. Indiana,
Indianapolis Division.
Aug. 1, 1975.

MEMORANDUM OF DECISION

DILLIN, District Judge.

This case comes before the Court for further hearing, pursuant to the direction of the Court of Appeals for the Seventh Circuit. 503 F.2d 68 (1974) cert. den. 421 U.S. 929, 95 S.Ct. 1655, 44 L.Ed.2d 86, 43 U.S.L.W. 3571 (1975). The previous history of the case, and of various related actions, is fully set out at 503 F.2d 71-75, and will not be repeated here. The names of certain defendants sued in a representative capacity, and whose terms have expired, have been deleted and their successors substituted.

This Court was specifically directed to determine whether the establishment of the Uni-Gov boundaries of the City of Indianapolis[1] without a like re-establishment of Indianapolis Public Schools boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). Pursuant to such direction, a further evidentiary hearing was held, beginning March 18, 1975, and the parties have submitted both oral argument and briefs, all of which have been considered. The Court has also given consideration to other matters raised by the pleadings and evidence, and to matters of Indiana law, all as will more fully appear.

The defendant Board of School Commissioners (IPS) on September 29, 1971, brought into the case as additional defendants, The Metropolitan Development Commission of Marion County (Commission) and The Housing Authority of the City of Indianapolis (HACI), and by way of a

[1] The boundaries of the city, pursuant to Uni-Gov, are coextensive with the boundaries of Marion County, except that the cities of Beech Grove and Lawrence ("excluded cities") and the unincorporated town of Speedway ("excluded town") are permitted to carry on as separate municipal corporations within the territory of the consolidated City of Indianapolis. Citizens of these communities have a dual status—for example, a Beech Grove voter may vote for Mayor of Indianapolis, members at large of the City-County Council, Mayor of Beech Grove, and city councilmen of Beech Grove.

cross-complaint charged them with implementing policies which contributed to the segregation of IPS. Declaratory relief was demanded. These issues were not taken up heretofore, but in its pretrial entry of December 13, 1974 the Court ruled that, in addition to the Uni-Gov issue, the issue of the effect, if any, of the housing and zoning laws, rules, regulations and customs in Marion County, Indiana and its various political subdivisions upon the de jure segregation of IPS, would be considered. The greater part of the evidence introduced at the March hearing was on the latter subject.

The issue regarding housing and zoning laws was not mooted by *Milliken*. To the contrary, the concurring opinion of Mr. Justice Stewart, which constituted the decisive vote as between an otherwise evenly balanced Court, stated, "Were it to be shown . . . that state officials had contributed to the separation of the races by drawing or redrawing school district lines . . .; or by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate." 418 U.S. at 755, 94 S.Ct. at 3132.

The evidence is undisputed that each and every public housing project constructed and operated by the added defendant HACI is located within IPS territory, in some instances just across the street from territory served by one of the added defendant school corporations. Each of such locations was approved—in some instances selected in the first place—by the added defendant Commission. The latter institution has had county-wide zoning jurisdiction at all times during the construction of 10 out of the 11 public housing projects for families, and HACI has at all times had the authority to erect public housing within the City of Indianapolis, and within five miles of the corporate limits of such city. The residents of said public

housing projects are approximately 98% black (except in projects for the elderly), and their children all attend school in IPS. The location of these housing projects by instrumentalities of the State of Indiana has obviously tended to cause and to perpetuate the segregation of black pupils in IPS territory.

The evidence in the record, as taken in all hearings, clearly shows that the suburban Marion County units of government, including the added defendant school corporations, have consistently resisted the movement of black citizens or black pupils into their territory. They have resisted school consolidation, they resisted civil annexation so long as civil annexation carried school annexation with it, they ceased resisting civil annexation only when the Uni-Gov Act made it clear that the schools would not be involved. Suburban Marion County has resisted the erection of public housing projects outside IPS territory, suburban Marion County officials have refused to cooperate with HUD on the location of such projects, and the customs and usages of both the officials and inhabitants of such areas has been to discourage blacks from seeking to purchase or rent homes therein, all as shown in detail in previous opinions of this Court.

[1] In its most recent opinion, 503 F.2d at 80, the Court of Appeals specifically concluded, with this Court, that state officials of the State of Indiana "have, by various acts and omissions, promoted segregation and inhibited desegregation within IPS, so that the state, as the agency ultimately charged under Indiana law with the operation of the public schools, has an affirmative duty to assist the IPS Board in desegregating IPS within its boundaries. . . ." Inasmuch as certiorari has been denied by the Supreme Court, the finding that the State has promoted segregation and inhibited desegregation within IPS is, quite obviously, the law of the case. The new findings of this Court that the

Commission and HACI have been guilty of such acts simply amplifies such earlier findings. The action of these agencies in confining poor blacks to the inner city has directly and proximately contributed to cause the suburban school districts within Marion County, other than Washington Township and Pike Township, to be and remain segregated white schools, with segregated white faculties and administrative staffs.

The evidence clearly shows that at the time of the passage of the Uni-Gov Act in 1969, various annexation plans and school consolidation plans had bogged down on the local level because of the aforementioned opposition of the suburban school corporations within Marion County, and their patrons. However, the General Assembly of Indiana, with its members elected on a state-wide basis, was not, or should not have been, subservient to local pressures, and undoubtedly could have legislated a county-wide school system for Marion County as easily as it legislated a county-wide civil government. Under existing law, both Federal as expressed in *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955), and in *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), and the law of Indiana as expressed in Acts 1949, Ch. 186, p. 603, Burns Ind.Stat.Ann. §§ 28-6106—28-6112 (1970), it had a duty to alleviate the segregated condition then existing in IPS. When the General Assembly expressly eliminated the schools from consideration under Uni-Gov, it signaled its lack of concern with the whole problem and thus inhibited desegregation with IPS.

[2] The Court finds that the establishment of the Uni-Gov boundaries without a like re-establishment of IPS boundaries, given all of the other facts and circumstances set out in this and former opinions of this Court, warrants a limited interdistrict remedy within all of Marion County, Indiana, as hereafter described.

Recently, the General Assembly has taken some steps to meet its duty under the law—specifically by passing P.L. 94 of the Acts of 1974, Burns Ind.Stat.Ann. §§ 28-5031—28-5040, I.C.1971, 20-8.1-6.5-1, et seq., as added 1974. The Court of Appeals in its opinion at 503 F.2d 74 refers to this statute as "rigidly limited in its application," which may well be, but in any event it does expressly recognize the power both of United States district courts and of the courts of the State to make orders regarding the transfer of pupils from one school corporation to another if certain conditions be found to exist, and affords a State policy and means for paying the costs of such inter-district relief, all of which was lacking in *Milliken*.

Specifically, the statute provides a means and method whereby a transferor school corporation may pay a transferee school corporation for the cost of education of a pupil transferred from the one to the other in compliance with a court order issued under the following conditions:

(1) In a suit where the transferor or transferee corporation or corporations are parties, the Court must have found the following:

> (a) A transferor corporation has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders;
>
> (b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor corporation; and
>
> (c) The Fourteenth Amendment Compels the Court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment.

In the case at hand, we have a suit in which all of the school corporations in Marion County, Indiana are parties,

and in which this Court has made, and now reiterates, the following findings:

(a) The defendant Board of School Commissioners of Indianapolis, Indiana (IPS) has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders. *United States v. Board of Sch. Com'rs*, Indianapolis, Ind., 332 F.Supp. 655 (S.D.Ind.1971), aff'd 474 F.2d 81 (7 Cir.), cert. den. 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973).

(b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of IPS. "In the long haul, it won't work." 332 F.Supp. at 678.

This Court found as a fact in its opinion of July 20, 1973, 368 F.Supp. 1191, et seq., that within the IPS boundaries resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or less. That finding has not been challenged by anyone. Therefore, in a school corporation in which the percentage of black pupils has now reached more than 42% over all, and with the Court of Appeals having ordered this Court to take further steps to desegregate the same, 503 F.2d 80, the Court is placed in an impossible situation unless the transfer for education of a substantial number of black IPS pupils to school corporations other than IPS is accomplished.

The Court therefore makes the following additional finding:

(c) The Fourteenth Amendment compels the Court to order IPS to transfer a substantial number of its black students to various added defendant school corporations for education in order to effect a plan of desegregation in

the transferor corporation which is acceptable within the meaning of such amendment.

[3] The Court of Appeals has called the attention of this Court to the rule of law that "white flight" is not an acceptable reason for failing to dismantle a dual school system. 503 F.2d 80, citing *United States v. Scotland Neck City Board of Education*, 407 U.S. 484, 491, 92 S.Ct. 2214, 2218, 33 L.Ed.2d 75 (1970). However, it does not follow that this Court must ignore the probability of white flight in attempting to formulate guidelines for IPS to follow in accomplishing the final desegregation of its schools. In other words, as this Court sees it, white flight may not be used as an excuse for inaction; it may, however, supply the reason for a particular kind of action.

This approach requires the Court, once again, to review applicable statistics. "The Constitution does not compel any particular degree of racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful starting points in shaping a remedy . . ." *North Carolina Bd. of Ed. v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971).

For the school year 1974-75, there were 77,732 pupils enrolled in IPS, excluding kindergarten and special education students. Of these 44,756, or 57.57%, were white and 32,976, or 42.43%, were black. Virtually all schools had an enrollment of at least 15% black pupils, and 19 elementary schools and one high school had enrollments in excess of 80% black. As the Court understands the order of the Court of Appeals, this group of 20 schools must be further desegregated. As stated above, this Court has previously found that to require all schools to enroll about 42.43% black pupils would immediately accelerate white flight and unbalance the entire system beyond saving. The Court respectfully declines to stultify itself by giving any such direction.

The Metropolitan School Districts of Washington Township and Pike Township are integrating rather rapidly, as a result of demographic changes, so that Washington had a black percentage of approximately 15% and Pike a black percentage of approximately 12% for the past school year. These percentages seem likely to increase for the coming year. If the percentage of black students in the other suburban districts within Marion County were equivalent to that of Washington Township, approximately 9,525 black students would need to be transferred to such districts. The Court finds that the Fourteenth Amendment compels it to order IPS to transfer, and for the added defendant school corporations, other than Pike and Washington, to receive approximately such number of black students, over a period of time, in order to effect a plan of desegregation within IPS which is acceptable within the meaning of such amendment.

Transfers shall not include kindergarten nor special education students, and such students shall not be counted for the purpose of determining the number of transferees to each school corporation. Further, for the school year 1975-76, transfers will be limited to students in grades 1-9, inclusive, for a total of about 6,533 students, with the understanding that a student once transferred to a suburban school corporation will continue in such corporation until graduation from high school, unless the residence of such student is moved from IPS.

The number of students to be transferred to a particular school corporation shall be in such number as to cause the total enrollment of pupils in such school corporation, after the transfers have been accomplished, to be approximately 15% black. As an example, Beech Grove City Schools for the school year 1974-75 had an all white enrollment of 1,865 in grades 1-9, excluding special education. The 1,865 should be 85% of the school population after transfer; therefore

1% would be 21.9411, and 15% would be 15 × 21.9411 or 329. Approximately 329 black students would be transferred from IPS to Beech Grove in grades 1-9 for the coming school year. For the ensuing years, the original transferees would continue in the Beech Grove schools, and a new first grade group in an appropriate number would be transferred. Transfers by grade should be proportionate to the number of students enrolled per grade in the transferee schools for the past school year. Fortunately, the reports on classroom space filed by the added defendants reflects that, without exception, there is ample space available in which to house the transferees; also, IPS has ample transportation facilities available.

It is possible that transfers of black students to Washington Township should be made for education at the J. Everett Light Career Center; ruling on this point is reserved pending clarification as to certain statistical information in the record.

With regard to the present transfer of pupils, as above described and as will be more particularly set out in an accompanying order and judgment, the respective superintendents of the transferee school corporations involved, or their nominees, are directed to meet with the superintendent of IPS, or his nominees, forthwith in order to work out the exact names, numbers, and grades of pupils to be transferred. Reasonable deviations from exact statistical scheduling are anticipated, and may be agreed upon, subject to the approval of the Court. Disagreements, if any, shall be promptly referred to the Court for resolution. The transfers shall be effective, and transfer of pupils shall begin on the first day of the 1975-76 school year at each of the various transferee schools.

Once the transfer pupils have been identified, the defendant IPS is directed to submit to the Court a final plan for desegregation of the remaining schools within IPS.

Alternate plans may be submitted, in the discretion of IPS. Such plan or plans shall consider the high schools, as well as elementary schools. Kindergarten students and special education students need not be taken into account in computing black-white ratios in the various schools. Such plan or plans shall be submitted on or before October 15, 1975 and, if one be approved, it shall be put into effect at the beginning of the second semester of the 1975-76 school year, except as the Court may otherwise order.

[4] As previously found, the location by HACI of all of its public housing facilities within IPS territory has had a major influence toward keeping black students confined within IPS, while at the same time keeping the suburban school systems virtually all white. Such conduct should and will be enjoined, so as to prohibit HACI from locating any additional public housing units within the boundaries of IPS. Furthermore, HACI should and will be enjoined from reopening Lockefield Gardens, a public housing project which is now vacant, to tenants other than the elderly.

[5] The case for the intervening Buckley plaintiffs and their class was filed and has been presented by John O. Moss and John Preston Ward. The Court previously found them entitled to recover their reasonable attorneys fees and expenses, pursuant to 20 U.S.C. § 1617, but no fees have as yet been awarded, and the Court of Appeals has requested a further finding on the issue. 503 F.2d 86. It is the Court's opinion that the Buckley plaintiffs should be regarded as the "prevailing parties," within the meaning of such statute, if the rulings of this Court relating to transfer of pupils become final, since they are the only parties who have contended for a remedy going beyond the IPS strait jacket.

Orders will be entered in accordance with this memorandum.

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JUN 25 1978
MICHAEL RODAK, JR., CLERK

No. 77-1614

In the Supreme Court of the United States

OCTOBER TERM, 1977

OTIS R. BOWEN, AS GOVERNOR OF INDIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

DREW S. DAYS, III,
Assistant Attorney General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, officials of the State of Indiana and a state agency, seek review of an order of the court of appeals remanding this case to the district court for further proceedings. Contrary to petitioners' contention, the action of the court of appeals is consistent with this Court's previous order and raises no question warranting consideration by this Court.

1. The history of this protracted litigation is set out in some detail in *United States* v. *Board of School Commissioners of Indianapolis, Indiana*, 541 F. 2d 1211, 1212-1215 (C.A. 7) (Pet. App. A-32 to A-38). In that decision, the court of appeals upheld the district court's order requiring the adoption of an interdistrict desegregation plan. Under that plan, black students from the Indianapolis system would be assigned and transported to predominantly white schools located in suburban districts.

On January 25, 1977, this Court granted a writ of certiorari from that order and, without opinion, vacated the judgment and remanded the case "for further consideration in light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.* [429 U.S. 252] and *Washington* v. *Davis*, 426 U.S. 229 (1976)" (429 U.S. at 1068-1069).

On remand, the court of appeals further remanded the case for the district court to reconsider its judgment in accordance with this Court's directive (Pet. App. A-1 to A-30). The court noted that the district court had previously found that actions taken by state and local officials had increased segregation in the Indianapolis area schools but that the district court had not explicitly determined whether those actions had been taken with a discriminatory intent (Pet. App. A-6 to A-18). The court also directed that in the event the district court found a constitutional violation under the standard prescribed by this Court, the court should apply the principles of *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, in formulating an appropriate remedy (Pet. App. A-26).

Following the order of the court of appeals of which petitioners seek review, there have been further proceedings in the case in both the district court and the court of appeals. On April 7, 1978, the district court refused to permit the Indianapolis school system voluntarily to adopt a broad intradistrict desegregation plan until consideration of interdistrict desegregation was completed. On May 17, 1978, the court of appeals vacated that decision and remanded the case to the district court with directions to approve the intradistrict plan pending final determination of the interdistrict issue unless doing so would "produce injustice," or unless the district court found the plan to be "unsound." On June 2, 1978, the district court again refused to permit the implementation

of the intradistrict plan and ordered the Indianapolis Public School District to prepare an interdistrict plan.

2. The ruling of the court of appeals challenged here was not a final order; the court merely remanded the case for further legal and factual findings by the district court in accordance with the order remanding the case from this Court. There are no extraordinary circumstances here warranting review of this nonfinal order of the court of appeals. The order is therefore not ripe for review by this Court. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258; *American Construction Co.* v. *Jacksonville Railway*, 148 U.S. 372, 378, 384.

On the merits, petitioners contend that the court of appeals erred by not summarily disposing of the case on remand from this Court. In their view, the court of appeals should have ruled that the district court could not possibly find a constitutional violation under the standard prescribed by this Court, even though the district court had not previously had occasion to apply that standard to the facts of the case.

In declining to follow that course but determining instead to give the district court an opportunity to apply the proper legal standard to the facts of the case, the court of appeals did not err. Since this Court directed reconsideration of the record in light of intervening decisions, it was entirely appropriate to allow the court most familiar with the record and with the case in general to make the initial decision concerning the alleged constitutional violation. See *Dayton Board of Education* v. *Brinkman, supra*, 433 U.S. at 419; *Brown* v. *Board of Education* (*Brown II*), 349 U.S. 294, 299. Contrary to petitioners' assertions (Pet. 18), nothing in this Court's order of January 25, 1977, precludes a remand to the district court.

Petitioners suggest that the court of appeals' order of February 14, 1978, will necessarily cause further delay in desegregation within the boundaries of the Indianapolis system. To the contrary, the court was careful to note that the immediate implementation of intradistrict remedies would be "wholly appropriate" (Pet. App. A5). Moreover, in its May 17 order, the court of appeals directed the district court to permit the immediate adoption of the School District's intradistrict plan unless it specifically found that implementation of that plan would be improper. Whether an intradistrict remedy will be implemented immediately is unclear, in light of the district court's order of June 2, but that question remains to be resolved in further proceedings in the district court and the court of appeals; it clearly was not foreclosed by the order challenged here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DREW S. DAYS, III,
Assistant Attorney General.

JUNE 1978.

DOJ-1978-06

Supreme Court, U. S.
FILED
JUN
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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THEODORE L. SENDAK, as Attorney General of the State of Indiana;
HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION, a public corporate body,

Petitioners,

vs.

UNITED STATES OF AMERICA,
and
DONNY BRURELL BUCKLEY
ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,
et al.

Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM L. TAYLOR
Catholic University
Law School
Washington, D.C. 20064

Of Counsel

JOHN WOOD
BAMBERGER & FEIBLEMAN
500 Union Federal Building
Indianapolis, Indiana 46204

Counsel for Respondent Board of School Commissioners of the City of Indianapolis

Reprographics Inc., 1732 Eye St. N.W., Washington, D.C. 20006 (202) 298-5537

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Respondents.

Memorandum in Opposition to Petition for Writ of Certiorari

For reasons set forth in this Memorandum, respondent Board of School Commissioners of the City of Indianapolis (IPS) submits that this inter-district school segregation

case is not in an appropriate posture for Supreme Court review.[1]

When this case was last presented for review from a decision of the Court of Appeals for the Seventh Circuit affirming District Court findings of an inter-district violation and requiring an inter-district remedy, this Court vacated the judgment and remanded the case to the Court of Appeals "for further consideration in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976)," two recent cases explicating the requirement of proof of racially discriminatory intent as the basis for finding a violation of the Equal Protection Clause of the Fourteenth Amendment. 429 U.S. 1068 (1977). The Court of Appeals then carefully considered prior opinions in the case in the light of *Arlington Heights* and *Davis*, identified elements of the inter-district violation in which findings of racial intent had not previously been made, and remanded the case to the District Court "to make further findings of fact from evidence already in the record, or, if necessary as supplemented by additional evidence," A.6.

Petitioners' current effort to obtain review by this Court is apparently predicated on a belief that this Court's prior remand for further consideration should have been treated by the Court of Appeals as a summary reversal of its earlier judgment, leaving the court no choice but to dismiss the complaint for inter-district remedy on grounds

[1] We have chosen not to submit a lengthy Brief in Opposition to Certiorari correcting all of petitioners' omissions of fact and mischaracterizations of the law and the issues. In our view, the genuine issues, if any remain, will emerge clearly only after the actions and hearings directed by the Court of Appeals are concluded and a decision has been rendered by the District Court and reviewed by the Court of Appeals.

that *Davis* and *Arlington Heights* precluded such relief. That, of course, is not the action that this Court took.[2]

Apart from any substantive defect, petitioners' effort to secure review now is premature because they complain of an order lacking the finality that this Court ordinarily requires absent extraordinary circumstances. See, e.g., *Brotherhood of Locomotive Firemen v. Bangor and Aroostook R.R.*, 389 U.S. 327 (1967) where this Court denied review of a ruling remanding the case to the district court on grounds that the case "was not yet ripe for review." *Id.* at 328. The only "extraordinary circumstance" urged by petitioners is a contention that further consideration of the basis for inter-district remedy by the court below "is simply delaying desegregation" within the City of Indianapolis. Petition p. 18. This contention is groundless. Both the United States and the respondent IPS (the original plaintiff and defendant in the intra-district phase of this suit) have joined in urging the implementation of an intra-district remedy in September, 1978; respondent IPS has prepared an intra-district plan for implementation in the Fall of 1978; and the Court of Appeals has ordered that the plan be put into effect unless the District Court determines that it is not sound. (unpublished order in No. 78-1558, May 17, 1978).[3] Clearly then, the Court of Appeals does not view the pendency of the issue of inter-

[2] The difference between the two types of dispositions hardly requires elaboration. Following remand for further consideration in light of a recent decision, this Court after further explication of the facts has sustained the original decision below. See, e.g., *United States v. Virginia Electric Power Company*, 365 U.S. 624 (1961). See also *The Supreme Court, 1960 Term*, 75 Harvard L. Rev. 40, 98-99, 125-127 (1961).

[3] While the Distrirct Court on remand has found defects in the proposed intra-district plan, the remaining issues concern what form of plan will be implemented prior to an ultimate resolution of the inter-district issues, not whether there will be relief. (Entry in No. IP 68-C-225 June 2, 1978).

district relief as a reason for delaying an intra-district remedy.

Further, petitioners entirely misconceive the nature of the issues which remain to be resolved in this case. The question is not whether the added defendant suburban school districts are "guilty of any *de jure* segregation". Petition p. 21. Once it has been established, as it has in this case, that state and local authorities engaged in deliberately segregative acts within the central city school district, the absence of additional unlawful school practices by other districts does not in itself preclude inter-district relief, just as the presence of such practices would not of itself require an inter-district remedy. See *Milliken v. Bradley*, 418 U.S. 717, 745, and at 807-08 (1974) (Marshall, J. dissenting). Rather, the issues are (1) whether the adjudicated constitutional violation by the State and IPS within Indianapolis has produced "a significant segregative effect" in any or all of the suburban districts of Marion County (*Id.* at 745) and (2) whether state officials engaged in other acts, e.g. boundary manipulation or discriminatory housing practices, that contributed to inter-district segregation. *Id.* at 745, and at 755 (Stewart, J. concurring).

For example, a critical question in this case is the legal significance to be attached to the series of State decisions in the 1960s culminating in action to confine IPS to its particular borders while enlarging the boundaries of the City of Indianapolis for other governmental purposes, A.8-12. Among the factors that may have an important bearing on this issue are (1) the existence of a long-standing dual school system within IPS and the pendency of a law suit to disestablish that system at the time that critical state boundary decisions were made; (2) the unremedied inter-district effects of the *de jure* practices within IPS; (3) the permeability of the boundaries between IPS and other Marion County districts during the period when a dual system existed within IPS; (4) the

existence and effects of racially discriminatory state housing practices (both at the time the boundary decisions were made and since) which confined black students to attendance at IPS schools and contributed to the development of all-white schools in suburban districts;[4] and (5) the extent to which the limitation of IPS to its boundaries was a substantive departure from prior state policies favoring the establishment of school districts at least as extensive as the boundaries of relevant municipal jurisdictions.

Once the record on these matters is fully developed, the findings made by the courts below will provide a more ample basis for determining the existence of an inter-district violation, its nature and extent, and the type of remedy needed to cure the violation. The legal standard to be applied to the record evidence in assessing the existence and scope of the inter-district violation is ultimately for this Court to determine.[5] This Court's remand for further

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[4] For example, in 1961 when state law encouraged school district consolidations, such a consolidation was rejected in Marion County based not on educational factors but on "the unanimous opposition of the suburban school districts" (541 F.2d at 1217) at a time when these districts had few or no Negroes "within their borders." 368 F.Supp. at 1203. A finding that the absence of blacks in the suburbs was the product of racially discriminatory state housing policies would shed important light on the racial content of the 1961 rejection of consolidation and on other actions departing from the normal course in preventing the extension of school boundaries.

[5] The standards to be applied in inter-district cases have not yet been formulated with finality and precision by this Court. It *is* clear that boundary changes that interfere with the dismantling of a dual school system must be rescinded even where the actions were not undergirded by a racial purpose. *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972). In other circumstances, however, it has been said variously that a cross-district remedy may be justified if "district lines have been deliberately drawn on the basis of race" (*Milliken* at 745) and if state officials "contributed to the separation of the races by drawing or redrawing school district lines." *Milliken* at 755 (Stewart, J., concurring). We do not take the remand of this case for further consideration in light of *Arlington Heights* and *Davis* to be an ultimate pronouncement on the precise legal standard to be employed.

consideration clearly signaled its desire that the ultimate disposition of this case be informed by a "sensitive inquiry," of the kind called for by *Arlington Heights*, into all the facts and circumstances surrounding State boundary decisions and other important State actions. The Court of Appeals has provided for just such a sensitive inquiry by identifying the issues on which additional findings are required, providing guidance to the District Court and remanding to the District Court for further proceedings.

Respondent IPS believes that the inquiry called for by this Court will reveal an extensive inter-district violation and has sought an opportunity below to develop a full record on the context of state actions alleged to be discriminatory. The development of such a record along with appropriate findings of fact is the only course that will assure that when this case is next presented for appellate review it will be in a posture that permits a definitive disposition that is fair to all the parties.

CONCLUSION

Wherefore, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM L. TAYLOR
Catholic University
Law School
Washington, D.C. 20064

Of Counsel

JOHN WOOD
BAMBERGER & FEIBLEMAN
500 Union Federal Building
Indianapolis, Indiana 46204
(317) 639-5151

Counsel for Respondent
Board of School Commissioners
of the City of Indianapolis

Supreme Court, U. S.
FILED
JUL 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1614

OTIS R. BOWEN, as Governor of the State of Indiana;
THEODORE L. SENDAK, as Attorney General of the State of Indiana;
HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;
THE INDIANA STATE BOARD OF EDUCATION, a public corporate body,

Petitioners,

vs.

UNITED STATES OF AMERICA, and DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Respondents.

RESPONSE TO MEMORANDA IN OPPOSITION FOR WRIT OF CERTIORARI

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Chief Counsel

WILLIAM F. HARVEY
Special Counsel

ATTORNEYS FOR PETITIONERS
Office of Indiana
Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6249

C. E. Pauley & Co., Inc., Indianapolis

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Appendix:

Entry of United States District Court for the Southern District of Indiana, Indianapolis Division, No. IP-68-C-225, dated June 2, 1978 ..... A-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1614

OTIS R. BOWEN, as Governor of the State of Indiana;

THEODORE L. SENDAK, as Attorney General of the State of Indiana;

HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana;

THE INDIANA STATE BOARD OF EDUCATION, a public corporate body,

Petitioners,

vs.

UNITED STATES OF AMERICA, and DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Respondents.

RESPONSE TO MEMORANDA IN OPPOSITION FOR WRIT OF CERTIORARI

Petitioners, Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; and the Indiana State Board of Education, a public corporate body (hereafter State Defendants) hereby submit their Response to Memoranda In Opposition For Writ of Certiorari filed by the Solicitor General of the United States and by counsel

for the Board of School Commissioners for the City of Indianapolis.

ARGUMENT

I.

Response to the Board of School Commissioners for the City of Indianapolis

The Petition before this Court arises from a school desegregation case that has been pending in the federal court system since May 31, 1968. In opposing that Petition counsel for the Board of School Commissioners of the City of Indianapolis (hereafter I.P.S.), who have only been involved in that litigation for a little over a year, state in a footnote that they were not submitting a lengthy brief to correct the Petition's "omissions of fact and mischaracterizations of the law on the issues." Then, on the very next page, they make a blatant misrepresentation to the court on the status of this case in the district court, stating:

> . . . Both the United States and the respondent IPS (the original plaintiff and defendant in the intra-district phase of this suit) have joined in urging the implementation of an intra-district remedy in September, 1978; respondent IPS has prepared an intra-district plan for implementation in the Fall of 1978; and the Court of Appeals has ordered that the plan be put into effect unless the District Court determines that it is not sound. (unpublished order in No. 78-1558, May 17, 1978).

The United States and I.P.S. have requested an intra-district remedy for the desegregation of the Indianapolis Public Schools. However, on June 2, 1978, the district court entered an order rejecting the intra-district plan, and ordered an inter-district plan for the reassignment of over 9,000 students to school districts which were not parties to the hearing giving rise to that order.

Thus, even though I.P.S. has proposed an intra-district plan and the court of appeals ordered the district court

to consider the plan, the Court, eleven (11) days prior to I.P.S.'s response to the Petition for Writ of Certiorari, rejected that plan.

Counsel for I.P.S. states that the Petitioners apparently seek to have a summary reversal of the Seventh Circuit based upon the reversal from this Court. In criticizing that position, which action the Petitioners do contend should have been taken, I.P.S. lists several "factors" which if considered "may have an important bearing" on an inter-district remedy in this case. Those factors are precisely the reasons that the Petitioners seek to have this Court reverse the decision of the Seventh Circuit entered on February 14, 1978, and if counsel for I.P.S. would have examined the eight (8) year plus history of this case prior to their appearance, then they would have realized that all of those "factors" had been fully litigated.

As stated in the Petition, there have been three (3) trials in this case which have resulted in extensive Findings of Fact by the district court, those findings encompassing more than 76 pages of the Federal Supplement. The order of remand from this Court was for the Seventh Circuit to reconsider the case in light of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) and *Washington v. Davis,* 426 U.S. 299 (1976).

The extensive record in this case shows that there is no basis for any inter-district remedy, and that record shows that there has been no intent to segregate any of the schools in Indiana by any of the state officials or suburban school districts. Further hearings or opinions by the district court will not develop such non-existent facts. Thus, the Seventh Circuit should have summarily reversed the district court and ordered the district court to dismiss the suburban school districts and the State Defendants, and to proceed with the desegregation of I.P.S. within that district.

It is evident that the district court wants an inter-district remedy since it feels that an intra-district remedy, once implemented, will not work forever. That "feeling" is contrary to the state of the law as developed by this Court and indicates that this Court should compel the Seventh Circuit to follow the order of remand, examine the current findings for any evidence of intent to discriminate, and finding none, to order the dismissal of the Defendants as mentioned above.

II.

Response to the United States

On June 2, 1978, the district court entered an order which alone shows that this Court should grant this petition, although the order is not fully described by the Solicitor General in his memorandum to this Court. The district court, once again, directed the reassignment of over 9,000 black students to school districts in Marion County, Indiana, other than the Indianapolis Public Schools. See copy of Entry appended hereto at page A-1 and see pages A-68 to A-78 of the Petition.

The school districts to which those black students would be delivered are not segregated schools, and they were *found* not to be segregated by the district court, which finding should have ended this case several years ago.

The June 2, 1978 order by the district court was directed at school districts which were not a part of the hearing which produced the order and which were not parties to that proceeding. They were, of course, denied due process of law on the face of the district court's order.

That order was essentially the same "remedy" which the court of appeals affirmed in *United States v. Board of School Commissioners of Indianapolis, Indiana,* 541 F.2d 1211 (7th Cir., 1976), and which this court vacated, 429 U.S. 1068 (1977), but which, now, the district court has re-entered.

The June 2, 1978 order from the district court was the inevitable product of the remand decision in the majority opinion of the court of appeals, and is in direct disregard of this Court's mandate to the court of appeals, and of this Court's decisions. It was accurately discussed by the Solicitor General of the United States in his Memorandum to this Court when this case was here in the 1976 Term in number 76-515 which resulted in the order which vacated the decision of the Seventh Circuit. 429 U.S. 1068 (1977). At that time the Solicitor General correctly spoke to the evidentiary and legal questions in this case at pages 15-17 of his Brief:

> 3. Even if there were evidence that the defendants in this case had engaged in intentional inter-district acts of racial discrimination with inter-district effects, it would not follow that the district court selected the proper remedy. The district court's remedy is designed to provide a degree of racial balance in all of the schools in Marion County. This relief has been prescribed without reference to the nature of the violations or their effects. Indeed, the district court did not even select school districts for inclusion in the plan on the basis of their participation (or lack of participation) in inter-district violations; it included or excluded them on the basis of the percentage of students who were black (see Perry App. A44).[14] The remedy thus is

[14] The remedy was also selected, in substantial part, because the district court believed that "resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or less" (Perry App. A42), and that it was necessary to spread black students throughout Marion County in order to prevent schools from reaching this "tipping point" which the district court called "resegregation" (ibid.). We disagree with the implications of this characterization. In our view, the Constitution forbids only racial discrimination and its effects; it does not prohibit racial imbalance in the schools if that imbalance arises from cases other than official racial discrimination. The district court's apparent belief that racial imbalance, however caused, is a violation of the Constitution would abolish the requirement that the racial separation

apparently designed to produce in the schools of Marion County a racial mixture that the courts below believe is desirable, rather than to eradicate the effects of racial discrimination.

We have stated in our memorandum in *Delaware State Board of Education v. Evans,* appeals dismissed for want of jurisdiction, November 29, 1976 (No. 76-416), and *Austin Independent School District v. United States,* vacated and remanded, December 6, 1976 (No. 76-200), that this is not the proper way to formulate the remedy in a school desegregation case. We believe that the principles we have articulated in those cases apply here as well. The goal of a remedial order in a school desegregation case should be to put the school system and its students where they would have been but for the violations of the Constitution. The goal is, in other words, to eliminate "root and branch" the violations and all of their lingering effects. *Green v. County School Board,* 391 U.S. 430, 438. It is to eliminate those effects wherever they may be found, starting from the common understanding that "racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions." *Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189, 203.

In our view, "desegregation" is nothing more or less than the elimination of racial discrimination and all of its lingering effects "root and branch." The desegregation that courts are both empowered and obligated to accomplish is not the elimination of all racial separation without regard to its causes, whether *de jure* acts or *de facto* social processes. The existence of schools predominantly attended by members of one race does not in itself amount to racial discrimination; if it did, there would be no

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have been caused by acts of the State intended to affect the operation of the schools (rather than, for example, the acts of private individuals choosing where to live). See *Keyes v. School District No. 1, Denver, Colorado,* 413 U.S. 189; *Spencer v. Kugler, supra.*

meaning to the requirement of state action as a precondition to a violation of the Fourteenth Amendment. This is the critical line between racial discrimination and its effects, on the one hand, and mere difference of racial composition of attendance, on the other. See *Austin Independent School District v. United States, supra,* slip op. 4-5 (Powell, J., concurring).

The proper approach requires a court to seek to determine the consequences of the acts constituting the illegal discrimination and to eliminate their continuing effects. A conclusion that there has been some racial discrimination does not in itself support an inference that the discrimination caused all of the observed racial separation. See *Keyes v. School District No. 1, Denver, Colorado, supra.* It therefore does not support a judicial order that racial balance must be produced throughout the school system. See *Austin Independent School District, supra.* This follows directly from principles long accepted by this Court. "In fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." *Brown v. Board of Education,* 349 U.S. 294, 300. The task of an equitable decree is to correct the condition that offends the Constitution. A finding of a violation does not set a court at large to produce results that never would have occurred if all constitutional provisions had been observed. The court must instead order whatever steps are necessary for "disestablishing state-imposed segregation" (*Green, supra,* 391 U.S. at 439).

The analysis given by the Solicitor General in No. 76-515 was correct at that time and it is correct today. It explains why this petition should be granted and the writ issued to the Seventh Circuit which failed to follow this Court's order in the case presented on remand. The Solicitor General contends that the Seventh Circuit's order is not a final order, and thus, not reviewable at this time.

However, the brief fails to address the fact that through ten years of litigation no evidence has ever been produced of any intent to segregate any of the suburban schools by any of the defendants in this case, including the Petitioners. Therefore, the Seventh Circuit, based upon the existing record in this case, should have remanded it to the District Court with orders to dismiss the State Defendants and all suburban school districts and to proceed with the desegregation of I.P.S. within that district.

CONCLUSION

The State Defendants would respectfully urge this Court to issue the Writ of Certiorari for which they have prayed.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Chief Counsel

WILLIAM F. HARVEY
Special Counsel

ATTORNEYS FOR PETITIONERS

Office of Indiana
Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6249

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NO. IP 68-C-225

UNITED STATES OF AMERICA,

Plaintiff,

DONNY BRURELL BUCKLEY, ALYCIA MARQUESE BUCKLEY, By their parent and next friend, Ruby L. Buckley, on behalf of themselves and all Negro school age children residing in the area served by original defendants herein,

Intervening Plaintiffs,

INDIANA STATE TEACHERS ASSOCIATION,

Intervening Plaintiff,

-vs-

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA; KARL R. KALP, as Superintendent of Schools; MARY E. BUSCH, as President of The Board of School Commissioners; WALTER KNORR, MARTHA L. MCCARDLE, WILLIAM M.S. MYERS, W. FRED RATCIFF, JAMES R. RIGGS, PATRICIA WELCH, Members of The Board of School Commissioners of the City of Indianapolis,

Defendants.

OTIS R. BOWEN, as Governor of the State of Indiana; THEODORE L. SENDAK, as Attorney General of the State of Indiana; HAROLD H. NEGLEY, as Superintendent of Public Instruction of the State of Indiana; THE METROPOLITAN SCHOOL DISTRICT OF DECATUR TOWNSHIP, MARION COUNTY, INDIANA; THE FRANKLIN TOWNSHIP COMMUNITY SCHOOL CORPORATION, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF LAWRENCE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF PIKE TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WARREN TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WASHINGTON

TOWNSHIP, MARION COUNTY, INDIANA; THE METROPOLITAN SCHOOL DISTRICT OF WAYNE TOWNSHIP, MARION COUNTY, INDIANA; SCHOOL CITY OF BEECH GROVE, MARION COUNTY, INDIANA; SCHOOL TOWN OF SPEEDWAY, MARION COUNTY, INDIANA; THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY; THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS; THE INDIANA STATE BOARD OF EDUCATION a public corporate body;

Added Defendants,

CITIZENS FOR QUALITY SCHOOLS, INC.;

Intervening Defendant,

COALITION FOR INTEGRATED EDUCATION;

Amicus Curiae.

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA,

Cross-Claimants,

-VS-

THE METROPOLITAN DEVELOPMENT COMMISSION OF MARION COUNTY, THE HOUSING AUTHORITY OF THE CITY OF INDIANAPOLIS,

Cross-Defendants.

ENTRY

This case comes before the court once again, this time on the order of the Court of Appeals directing this court to give further consideration to its order of April 7, 1978 denying approval of a skeleton desegregation plan proposed by the defendant Board of School Commissioners of the City of Indianapolis (IPS), and intended by it to be implemented for the 1978-79 school year. The plan is referred to by the Court of Appeals as the Proposed Intradistrict Plan, and will hereafter be so styled herein by its initials (PIP).

The Court of Appeals has posed certain questions to this court, which will be answered *seriatim*. However, it also requests that a determination as to the merits of PIP be made independently of the matter of an interdistrict remedy. With all due respect, this court is simply unable to consider one without the other for the very simple reason that the Court of Appeals has already adopted this court's previous findings, based on the evidence, that an interdistrict remedy is the only practical way to desegregate IPS with any prospect of long term success. A recent pronouncement of the Court of Appeals adopting this finding as the law of the case, and criticizing the United States for doing the very thing it is doing in this rather precipitous appeal is as follows:

> "The Government contends that the mandatory transfer of students between IPS and the suburban schools ordered by the district court is improper. After conceding the import of *Milliken*, the propriety of interdistrict relief, and noting the specific finding of facts found by the district court to have substantially caused segregation in the other districts, the Government concludes the district court's order was an abuse of discretion. We are confused by the Government's reasoning.
> "We fail to see how the district court abused its discretion when it was clearly acting within the

guidelines of *Milliken*. It was not an abuse of discretion merely because the Government would have preferred another remedy.

"Furthermore, the Government's arguments are inconsistent. On the one hand, it demands that segregation be eliminated root and branch from within IPS; on the other, it condemns the only relief which can make its demand a reality. We are surprised the Government seriously offers voluntary transfer as an alternative to mandatory transfer as a means to effectuate its goal of complete segregation. History has taught us that 'freedom of choice' plans produce negligible results. *Green v. County School Board,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1967)." *United States v. Board*, 541 F.2d 1211, 1223.

Further, this court believes that the interdistrict remedy previously ordered by it can and should be put into effect at once, wholly apart from the considerations posed by such cases as *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and *Washington v. Davis,* 426 U.S. 229 (1976). These cases, requiring a finding of a racially discriminatory intent as a prerequisite to the granting of equitable relief, deal purely and simply with the limits on the power inherent in a federal court of equity to rectify problems arising as a result of segregation.

As a matter of constitutional law, then, the Court of Appeals has held, following the mandate of the Supreme Court, the *Arlington Heights* and *Washington v. Davis* must be considered by this court. This court will do so and will express its findings in a very short time. *Meanwhile, however, it is respectfully submitted that the State of Indiana has provided a remedy which this court has followed, but which has heretofore never been considered by the Court of Appeals because no appellant added defendant school corporation has raised or challenged the point.*

In its Supplemental Memorandum of Decision dated December 6, 1973, 368 F.Supp. 1191 beginning at 1223, this court recognized both the right and the duty of the General Assembly of Indiana to legislate with a view toward assisting in the process of desegregation. Various possible approaches were pointed out, but with no suggestion as to which would be preferable; indeed, the General Assembly was encouraged to come up with a workable solution of its own.

Shortly thereafter, during its 1974 session, the General Assembly acted promptly upon this court's suggestion, and adopted a method by which any state or federal court in Indiana could order transfers of students from segregated school corporations to other school corporations, and provided a workable method of reimbursement to the transferee corporations. This Act was written, passed, and in force under an emergency clause on February 20, 1974—only 76 days after it was suggested by this court as one possible means of meeting the problem! I.C. 1971, 20-8.1-6.5-1, et seq. The Act provides that three essential elements be met in order for the transfers to take place, as follows:

(1) A transferor corporation must have violated the equal protection clause of the fourteenth amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders;

(2) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of the transferor school corporation; and

(3) The fourteenth amendment compels the court to order a transferor corporation to transfer its students for education to one or more transferee corporations to effect a plan of desegregation in the

transferor corporation which is acceptable within the meaning of such amendment.

The foregoing constitute all of the requirements for transfer (save exhaustion of appeals). There is no requirement whatever for *Arlington Heights* or *Washington v. Davis* analysis of the transferee corporation, nor that it have been guilty of any fourteenth amendment violation. The statute represents purely and simply a State enacted remedial measure, which the General Assembly had undoubted power to enact.

At the time the Indiana Transfer Act (ITA) was passed, this case was on appeal, and continued in this status until April 21, 1975, on which date the Supreme Court denied certiorari as to the decision of the Court of Appeals dated August 21, 1974, 503 F.2d 68. That decision directed this court to have a further hearing to determine whether, under the guidelines of *Milliken v. Bradley,* 418 U.S. 717 (1974), a case decided by the Supreme Court while the Indianapolis case was on appeal, an interdistrict remedy was justified within the area of Uni-Gov. Such a hearing was held, and the question answered in the affirmative on August 1, 1975 (Indianapolis IV), 419 F.Supp. 180. That decision was affirmed by the Court of Appeals on July 16, 1976, 541 F.2d 1211, but the latter decision was vacated and remanded by the Supreme Court on January 25, 1977, 429 U.S. 252. The Court of Appeals then vacated and remanded the decision of this court on February 14, 1978 (mandate received March 31, 1978). The latter decision is as yet unreported.

In its opinion of August 1, 1975, this court specifically stated that in addition to the *Milliken* question it would also consider matters of Indiana law, thus:

> "This Court was specifically directed to determine whether the establishment of the Uni-Gov boundaries of the City of Indianapolis without a like

> reestablishment of Indianapolis Public Schools boundaries warrants an interdistrict remedy within Uni-Gov in accordance with *Milliken v. Bradley,* 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). Pursuant to such direction, a further evidentiary hearing was held, beginning March 18, 1975, and the parties have submitted both oral argument and briefs, all of which have been considered. The Court has also given consideration to other matters raised by the pleadings and evidence, and to matters of Indiana law, all as will more fully appear" 419 F.Supp. 180, at 182.

After answering the *Milliken* question in the affirmative, this court then immediately launched into a discussion of the ITA, pointed out its essential elements as previously set out in this opinion, and then set out its findings as follows:

> "In the case at hand, we have a suit in which all of the school corporations in Marion County, Indiana are parties, and in which this Court has made, and now reiterates, the following findings:
>
> (a) The defendant Board of School Commissioners of Indianapolis, Indiana (IPS) has violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by practicing de jure racial segregation of the students within its borders. *United States v. Board of Sch. Com'rs, Indianapolis, Ind.,* 332 F.Supp. 655 (S.D. Ind. 1971), aff'd 474 F.2d 81 (7 Cir.), cert. den. 413 U.S. 920, 93 S.Ct. 3066, 37 L.Ed.2d 1041 (1973).
>
> (b) A unitary school system within the meaning of such amendment cannot be implemented within the boundaries of IPS. 'In the long haul, it won't work.' 332 F.Supp. at 678.
>
> "This Court found as a fact in its opinion of July 20, 1973, 368 F.Supp. 1191, et seq., that within the IPS boundaries resegregation of desegregated schools occurs when the percentage of black students in a given school approaches 25% to 30%, more or

less. That finding has not been challenged by anyone. Therefore, in a school corporation in which the percentage of black pupils has now reached more than 42% over all, and with the Court of Appeals having ordered this Court to take further steps to desegregate the same, 503 F.2d 80, the Court is placed in an impossible situation unless the transfer for education of a substantial number of black IPS pupils to school corporations other than IPS is accomplished.

"The Court therefore makes the following additional finding:

(c) The Fourteenth Amendment compels the Court to order IPS to transfer a substantial number of its black students to various added defendant school corporations for education in order to effect a plan of desegregation in the transferor corporation which is acceptable within the meaning of such amendment." 419 F.Supp. 180, 184.

This court then ordered that a certain number of black students be transferred from IPS to various other school corporations within the Uni-Gov area. In a separate order of the same date, exact numbers of students were assigned to each transferee school. IPS was ordered to identify the transfer pupils and then to submit to this court a final plan for desegregation of the remaining students within IPS. 419 F.Supp. 186. (IPS has not complied with this order in any particular; indeed, it specifically directed its Director of Planning to disregard it and to work up the PIP plan when he brought such order to the attention of the present Board. Testimony of witness Payne, May 30, 1978.)

In making the explicit findings compatible with ITA, as above set out, this court was obviously acting pursuant to the terms of that act. Not one of the transferee corporations named in the accompanying orders of the court challenged these findings on appeal. Rather, they raised the false issue that there was insufficient evidence to support the *Milliken* findings. This very clever maneuver on the

part of such added defendants has been successful to date, since the Buckley plaintiffs have sought only to meet the errors asserted by added defendants (and the original plaintiff), and have wholly failed to point out to the Court of Appeals that the remedy provided by the State of Indiana makes it unnecessary to consider the constitutional issues which would otherwise require solution. However, the time in which a transferee corporation could have questioned this court's findings has long since passed, so there would appear to be no reason why this court's orders, based on ITA, should not be carried out.

Long established practice holds that questions of constitutionality are not to be decided unless such adjudication is unavoidable. *Kelly v. Illinois Bell Telephone Company,* 325 F.2d 148 (7 Cir. 1963). Although application of ITA requires constitutional determinations to be made by the trial court, such have in this case been made long ago and have either been affirmed on appeal or not raised on appeal. They are now *res judicata,* and ITA may and should be applied.

This court was ordered to consider the merits of the PIP plan. Of course, it had already done so insofar as could be done in view of the incompleteness of the submission, when it denied permission to implement the plan on April 7, 1978, after hearing the arguments of counsel on April 6, 1978. However, in order to supplement the record, and to develop facts required to meet the questions posed by the Court of Appeals, a further hearing was had on May 30-31, 1978. The United States offered no evidence, but evidence was presented by IPS, the Buckley intervening plaintiffs, and by intervening plaintiff Indiana State Teachers Association. From the evidence heard the court finds as follows:

(A) PIP is not sound (apart from any interdependence with an interdistrict remedy) as a remedy to be put into effect in 1978-79, because:

(1) It is not complete in that Phase III (the plan for the elementary schools) has not even begun except for the two-page skeleton filed May 26, 1978 at 4:13 p.m. Even the skeleton had not been adopted at the time it was filed, and was not adopted until some sort of a hurry-up meeting was held on Memorial Day, May 29.

(2) It cannot be implemented as to Phase II (upper elementary) because Phase II (the details of which were only filed on May 26, 1978 at 4:13 p.m.) depends upon the use of two buildings which are not even in existence, and which will not be completed for a matter of years. Most of the other proposed upper elementary schools require remodeling or additions which will require until January, 1979 to complete.

(3) It should not be implemented as to Phase I (high schools), as it is unnecessarily complicated and substantially destroys the stability of presently stable elementary schools.

(a) There are only two high schools which are substantially out of phase which the Board's own guidelines. Both schools have an unduly high black population, but this has come about since the filing of this action as a matter of demographic movement. It is not necessary to reorganize the high school patterns in the whole city to change the racial balance in two schools.

(b) The PIP plan provides that elementary students may only attend schools located in their ultimate high school attendance areas, so that many present elementary attendance areas will be split.

(4) PIP has been discussed either minimally, or not at all, with IPS teachers, with the exception of the options aspect. A new plan of massive reassignments which has not been explained to the teachers will not function well, if at all.

(5) The main selling point of the PIP plan was the options plan for the elementary schools. Only 20% of the elementary children, or their parents, made a choice under the options plan. As a result IPS has *voluntarily* abandoned the options plan, except for a few pilot schools.

(6) While IPS was attempting to sell its options plan to parents, teachers, pupils, and the public, it gave no general publicity to the fact that PIP in its entirety was in reality a massive desegregation plan.

(a) Consequently, the public, parents, teachers, and pupils are unprepared for PIP.

(b) The above facts will hinder or defeat the success of PIP, according to IPS's own witnesses.

(7) IPS to this date has not furnished the court with any estimate as to the number of students who will be dislocated and reassigned from the present schools under PIP.

(8) PIP represents a "massive 'fruit basket' scrambling of students . . ." which both this court, 332 F.Supp. 655, 678, and the Court of Appeals have said " 'won't work' in the long run." Moreover, all witnesses who testified on this point at the hearing of May 30-31, including the defendant Superintendent of Schools of IPS, agreed with this statement.

(B) The representation that PIP cannot be implemented for 1978-79 unless it be approved at about the present time is incorrect.

(1) It could not be implemented for 1978-79 even if it was approved at this time, because:

(a) The options plan has already been abandoned for lack of interest.

(b) The Phase II buildings cannot be built or altered in time.

(C) If PIP were presently approved and implemented for 1978-79, and at some later time an interdistrict remedy were found appropriate, (answering the precise question

put, although an interdistrict remedy is already appropriate under ITA) the implementation of PIP might well interfere with, and in fact prevent entirely the formulation and implementation of interdistrict remedy.

Of the many Supreme Court cases on desegregation, probably the most quoted case after *Brown I*, and certainly the easiest to understand, is *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, (1971). The last two paragraphs of the text in that decision read as follows:

> "At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in Brown I. The systems would then be 'unitary' in the sense required by our decisions in Green and Alexander.
>
> "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." 402 U.S. 1, 31.

As stated above, the United States presented no evidence at the current hearing. However, its counsel made an opening statement in which he said, or said in substance, the following:

(1) IPS schools can be desegregated with the IPS only PIP plan.

(2) By desegregated is meant that ". . . if you take all these schools and make them 60-40 or something like that, then theoretically you have fulfilled the constitutional mandate."

(3) The Government will not predict and is not concerned with what will happen after a massive racial balancing plan is put into effect, so long as it is theoretically sound on paper from the standpoint of numbers.

(4) The Attorney General is opposed to any plan which would involve suburban schools.

It seems obvious to this court that if PIP is ordered implemented by the Court of Appeals, the United States will immediately declare IPS desegregated and get out. Indeed, under *Swann* it will be argued by added defendant transferee corporations and perhaps by the Attorney General as well that the case must forthwith end, except for monitoring. The Buckley plaintiffs, representing all black school children in IPS do not want this result, the trial court does not want this result, and the Court of Appeals did not appear to want it when it spoke as set out on pages 1 and 2 of this opinion.

(D) The explanation for it being termed "counterproductive" to put the PIP into effect for the year 1978-79 (or any year) is:

(1) It is unsound, as explained in (A).

(2) It might well block further consideration of any interdistrict remedy, as explained in (C). It is submitted that, contrary to the tentative opinion of the Court of Appeals appearing at the top of page 6 of its May 17 order, such would produce probable injustice.

One other matter remains, as to matters on appeal, and that is the matter of the reassignment of students presently attending the Harry E. Wood High School. This court originally denied the proposed method of reassignment

on no very good basis except that it appeared to be a part of a wholly unsound package (PIP). The court now reverses itself and approves the proposed Wood plan, if it has jurisdiction to do so; if it does not have such jurisdiction, it respectfully suggests that the Court of Appeals order such plan approved.

The court detects a note of urgency in the May 17 order, which is not inappropriate in view of the length of time this case has been in the courts. However, this is no routine case, and in the end should result in implementation of the innovative plan designed by the General Assembly of Indiana, which might well serve as a guide to other troubled school districts.

It is not as if nothing were being done in Indianapolis to relieve segregation. Approximately 9,500 students have been bused daily since 1973 without serious incident; all high schools meet or approach PIP guidelines save two; there are no longer any all white schools at any grade level. The only remaining problem of substance is the several 90% or more black elementary schools, and this problem will be alleviated by application of ITA and relatively minor readjustments thereafter.

ORDER

Having answered all questions put to it by the Court of Appeals, this court now returns to old business. If IPS can draw up a completely new, city wide, Phase III elementary school plan where none at all now exists, and do it in eight weeks (which is testimony about which this court has some reservation), it can surely designate the pupils for transfer to transferee school corporations, and adjust the remaining IPS students even more quickly. It was ordered to make such plans in 1975, and has not done so. The reason is clear—the IPS superintendent testified that

IPS did not want to give up any students or close any schools. This may be a reason, but it is not an acceptable excuse.

It is therefore considered and ordered that the defendant Board of School Commissioners forthwith proceed to formulate a plan for the transfer of black students to the various transferee school corporations, in the same numbers and grade levels, all as set out in this court's judgment dated August 1, 1975. IPS may consult with the transferee schools, but will be sole judge as to what students will be transfereed, and will not delay its plans for purposes of consultation. Such plan should be completed within six weeks from this date, or sooner if possible.

Further orders will be made regarding the implementation of such plan pursuant to ITA at the same time that this court announces its findings and conclusions as required by the Court of Appeals in its remand of February 14, 1978. It is anticipated that the same will be forthcoming in three weeks, more or less, but said planning should begin on receipt of this order.

All of which is considered and ordered this 2nd day of June, 1978.

S. Hugh Dillin, Judge

Copies to:

Lewis C. Bose
William M. Evans
1100 First Federal Building
Indianapolis, Indiana 46204

Richard L. Brown
156 East Market Street
Indianapolis, Indiana 46204

Richard J. Darko
Suite 2700
One Indiana Square
Indianapolis, Indiana 46204

Charles W. Hunter
810 King Cole Building
Indianapolis, Indiana 46204

Harold E. Hutson
1322 Circle Tower
Indianapolis, Indiana 46204

H. William Irwin
1200 Merchants Bank Building
Indianapolis, Indiana 46204

Charles D. Kelso
4030 North Pennsylvania Street
Indianapolis, Indiana 46205

William F. LeMond
Suite 600
45 North Pennsylvania Street
Indianapolis, Indiana 46204

William E. Marsh
735 West New York Street
Indianapolis, Indiana 46202

Virginia Dill McCarty
United States Attorney
274 U. S. Courthouse
Indianapolis, Indiana 46204

John O. Moss
Suite 902
156 East Market Street
Indianapolis, Indiana 46204

Kurt F. Pantzer, Jr.
Room 500
111 Monument Circle
Indianapolis, Indiana 46204

Alexander Ross
Samuel Flanagan
Civil Rights Division
Department of Justice
Washington, D. C. 20530

Donald A. Schabel
Room 1200
111 Monument Circle
Indianapolis, Indiana 46204

William O. Schreckengast
380 Main Street
Beech Grove, Indiana 46107

Theodore L. Sendak
Donald P. Bogard
Attorney General
219 State House
Indianapolis, Indiana 46204

Sheila Suess
2560 City-County Building
Indianapolis, Indiana 46204

Richard D. Wagner
Suite 2860
One Indiana Square
Indianapolis, Indiana 46204

John Preston Ward
Apartment 5
2951 North Capitol Avenue
Indianapolis, Indiana 46208

Ben J. Weaver
Charles G. Reeder
144 North Delaware Street
Indianapolis, Indiana 46204

John Wood
500 Union Federal Building
Indianapolis, Indiana 46204

James W. Beatty
Suite 400
45 North Pennsylvania Street
Indianapolis, Indiana 46204